Flying Foods Group, Inc. d/b/a Flying Foods *and* Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO. Cases12–CA–21462, 12–CA–21465, 12–CA–21505, 12–CA–21572, 12–CA–21662, and 12–CA–21677–1

August 25, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 24, 2002, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel also filed a limited exception to which the Respondent filed an answering brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

[1] There were no exceptions to the judge's finding that employee Angel Sanchez was not a supervisor under Sec. 2(11) of the Act. There were also no exceptions to the judge's dismissals of the allegations that the Respondent violated Sec. 8(a)(3) and (1) by disciplining employee Luis Hurtado and violated Sec. 8(a)(1) by: (1) threatening employees, through the Respondent's human resources manager, Daysma Grana, with discharge if they contacted the Union or the Board about disciplinary issues; (2) threatening, through employee Dario Mazier, to withhold wage increases from employees; (3) promising, through Mazier, a wage increase if employees decertified the Union; (4) informing employees, through Supervisor Rene Largaespada, that a wage increase was a reward for decertifying the Union and that the Union was replaced with an employee group; and (5) threatening employees, through Supervisor Nelson Nunez, with discharge for their support of the Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] We shall also substitute a new notice to conform it to the language of the Order and in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

I. INTRODUCTION

This case primarily concerns the Respondent's conduct during the final stages of negotiating an initial collective-bargaining agreement and its subsequent withdrawal of recognition from the Union on April 18, 2001. The judge found, among other things, that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and by making subsequent unilateral changes in employees' terms and conditions of employment. We agree with these findings for the reasons set forth below. We also agree with the judge that the Respondent's unilateral wage increase violated Section 8(a)(3), and that the Respondent committed several violations of Section 8(a)(1).

We find, however, in disagreement with the judge, that the Respondent did not violate Section 8(a)(1) by failing to make a wage proposal during the negotiating sessions on January 31 and March 28, by soliciting employees to sign a disaffection petition, or by showing its new employees a video informing them of their choice not to sign a union authorization card. We also disagree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to bargain in good faith with the Union between January 31 and April 18. Accordingly, we shall dismiss these complaint allegations.

II. BACKGROUND FACTS

The relevant factual background is set forth in full in the judge's decision and briefly summarized here. After a Board-conducted election, the Union was certified as the employees' collective-bargaining representative on March 29, 2000. The parties began negotiations for an initial contract in May 2000 and agreed to resolve all noneconomic issues before discussing wages.

By the end of January 2001,[4] the parties had agreed on most noneconomic issues. Because the Respondent had not raised the employees' wage scale since the Union's organizational campaign began in July 1999, the Union wanted to start negotiations on economic issues as soon as bargaining on noneconomic issues was complete. Additionally, employees' growing impatience with the progress of negotiations on wages sharpened the Union's desire to discuss wages. Accordingly, at the January 31

Most of the General Counsel's witnesses testified through an interpreter and the record indicates that many of the Respondent's employees do not speak English fluently. Because many unit employees are not native English speakers and may have difficulty understanding a notice posted in English, we shall order that the Respondent post the notice to employees in both English and Spanish. *Erie Brush & Mfg. Corp.*, 340 NLRB No. 169, slip op. at 2 fn. 3 (2003), enfd. 406 F.3d 795 (7th Cir. 2005); *Streicher Mobile Fueling, Inc.*, 340 NLRB No. 116, slip op. at 3 fn. 6 (2003), enfd. 2005 WL 1395063 (11th Cir. 2005).

[4] All dates refer to 2001, unless otherwise indicated.

bargaining session, the Union submitted a wage proposal and requested bargaining on wages. In response, the Respondent stated that its financial situation was so precarious that it could not make a wage proposal acceptable to the Union. The Respondent suggested that the Union conduct an audit of the Respondent's financial records and the Union agreed to do so. The parties agreed to discuss wages again after the Union conducted the audit. In early February, however, the Union formally requested a wage proposal from the Respondent. The Respondent again encouraged the Union to conduct the audit and said that after the Union understood the Respondent's financial situation, the parties could reach an agreement regarding wages. There was no further discussion about either the Union's audit or its request for a wage proposal during February.

Meanwhile, from late February through early April, the Respondent hired 50 to 60 employees into the existing unit of approximately 100 employees to work on two newly obtained accounts. Human Resources Manager Daysma Grana and senior employee Angel Sanchez, who was not a member of the bargaining unit, conducted new employee orientation seminars. Maintenance Manager Dario Mazier, another nonunit employee, also was present for two seminars. During the seminars, Grana and Sanchez screened the video "Little Card, Big Trouble" to new employees. Generally, the video tells employees about their right not to sign a union authorization card and tells them of the potential consequences of signing an authorization card. At the February 14 seminar in which this video was shown, Grana and Sanchez made statements that employee support of the Union would interfere with the Company's business opportunities. At one or more seminars, Sanchez and Mazier also expressed negative views of unionization and their experience with unions.

At the beginning of March, the Union decided not to conduct an audit of the Respondent's financial records and the parties immediately scheduled a bargaining session for March 28. Believing that its newly obtained business would bolster its financial condition, the Respondent suggested at the March 28 session that the parties further delay bargaining on wages so that it could gauge the financial effect of the two new accounts. The Respondent told the Union that if bargaining on wages could wait 30 days or so, it might be in a position to consider agreeing to the Union's earlier wage proposal. The Union agreed to delay bargaining, and the parties scheduled a bargaining session to discuss wages on May 3.

On March 29, however, the Union filed a refusal-to-bargain charge because of the Respondent's failure to make a wage proposal on March 28. The Union's negotiating committee also circulated an "affection" petition among employees and continued soliciting authorization cards, without much success, from new employees in order to shore up its support. According to the Union's chief negotiator, the committee was concerned about rumors of a disaffection petition circulating among new employees and the general lack of progress with negotiations on wages, especially since the certification year ended on March 29. Nevertheless, the Union withdrew the charge on April 12 because it did not want to hinder the bargaining session scheduled for May 3.

On or about April 18, Grana found a disaffection petition in her office signed by approximately 96 employees of the 164-employee unit and the Respondent withdrew recognition from the Union that same day. The identity of the person who put the petition in Grana's office is unknown, but credited testimony shows that Mazier was involved in soliciting employees to sign the petition. A few days later, the Respondent posted a notice informing employees that the Union no longer represented them and was decertified by the employees' petition.

In mid-May, the Respondent implemented a wage increase retroactive to May 3. Statements by management officials attributed the wage increase to the Union's decertification. Around this same time, the Respondent also implemented an employee-management group (referred to as the EAR group) to discuss workplace issues. It is undisputed that the Respondent implemented these changes without providing the Union notice and an opportunity to bargain.

III. DISCUSSION

A. The judge found, and we agree, that the Respondent violated Section 8(a)(1) when:

- Human Resources Manager Daysma Grana and nonunit employee Angel Sanchez, during a new employee orientation seminar they conducted on February 14, threatened loss of business opportunities if employees supported the Union.[5]
- Controller Monica Wilsher coercively interrogated employee Alberto Solano in late March.
- Grana told employees in May that "if the Union [wa]s certified, there [would not] be a raise."[6]

[5] In finding this violation, the judge correctly did not rely on Sanchez' statement that the Union "would only take money out of [employees'] pockets."

[6] Sanchez accompanied Grana to this meeting and repeated her comments. This meeting was not part of new employee orientation seminars. The General Counsel alleged that Sanchez' comments at the

- Grana told employees at a different meeting in May that the Respondent was going to give employees a salary increase because the "Union issue was over" and the Respondent's senior vice president of operations, Raul Burgos, told employees in a meeting a few days later that the Respondent was granting a wage increase "as a result of" the employee's earlier petition not to be represented by the Union.[7]
- Grana told employees in May that the Respondent was in the process of decertifying the Union and that, because the Union was no longer around, the Respondent was forming a group to deal with workplace issues.
- General Manager Victor Vidal directly told employees in May that the Union had been decertified.

B. We adopt the following findings made by the judge for the reasons set forth below.

1. Respondent's withdrawal of recognition

The judge, relying on two alternative rationales, found that the Respondent's April 18 withdrawal of recognition violated Section 8(a)(5) and (1): first, the judge reasoned that the Respondent's prewithdrawal unfair labor practices tainted the employee disaffection petition on which the Respondent relied in withdrawing recognition; and second, the judge reasoned that the Respondent failed to show the Union's "actual loss" of majority status at the time it withdrew recognition pursuant to *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 717, 725 fn. 49 (2001) (stating that employer can defeat a postwithdrawal refusal-to-bargain allegation if it shows, as a defense, the union's actual loss of majority status). While we agree with the judge that the Respondent's withdrawal of recognition was unlawful, we do so only on the basis of the judge's second rationale.

As discussed elsewhere in this decision, we have found that the Respondent committed only two prewithdrawal unfair labor practices: (1) Grana and Sanchez made unlawful statements during the February 14 new employee orientation session; and (2) Controller Monica Wilsher unlawfully interrogated employee Alberto Solano in March. Even though we have adopted the judge's findings on these two allegations, we find that the General Counsel has not established specific proof of a causal relationship between these unfair labor practices and the disaffection petition.[8]

We agree, however, with the judge's alternative finding that the withdrawal of recognition violated Section 8(a)(5) and (1) because the Respondent failed to show the Union's "actual loss" of majority status under *Levitz*, supra.[9] The Respondent's withdrawal of recognition rests solely on a multipage petition bearing 96 signatures. The Respondent's own witnesses testified that there were 164 employees in the unit on April 18 when it withdrew recognition from the Union. It is undisputed that 6 of the 96 signatures should not be counted. The question remains whether at least 82 of the remaining 90 signatures are valid.

Three employee signatories left their employment with the Respondent before April 18.[10] Writing exemplars from the Respondent's personnel records demonstrate that the signatures for seven other employees do not match their purported signatures on the petition.[11] Absent any countervailing evidence, we find these signatures are not authentic. Disregarding these 10 signatures on the petition, a maximum of 80 of the signatures could be valid, an insufficient number to prove the Union's actual loss of majority status.[12] Therefore, the petition does not

meeting were a separate violation. Although we agree with the judge, for the reasons set forth in his decision, that employee Sanchez was acting as an agent of the Respondent during new employee orientation seminars, we need not reach the issue of whether Sanchez was acting on the Respondent's behalf by his conduct at the May meeting. His statements, if found to be an unfair labor practice, would be cumulative of our findings that the same statements by Grana violated Sec. 8(a)(1).

[7] Although Member Schaumber agrees with his colleagues that Vice President Burgos's comments violated Sec. 8(a)(1), he does not pass on Grana's statements because such a finding would be cumulative and would not materially affect the remedy.

[8] See generally *Master Slack Corp*., 271 NLRB 78, 84 (1984).

[9] Although Chairman Battista and Member Schaumber agree with the judge that *Levitz* applies here, they did not participate in that case and express no view as to whether it was correctly decided.

We do not rely on any implication in the judge's decision that, under *Levitz*, an employer's withdrawal of recognition is unlawful where the employer fails to verify the authenticity of a disaffection petition before withdrawing recognition. As we discuss more fully below, regardless of the Respondent's actions with regard to the petition before withdrawing recognition, the petition, as revealed at the hearing, fails to show an actual loss of majority status.

In Chairman Battista's view, after the General Counsel has established a withdrawal of recognition at the hearing, the Respondent meets its defensive burden by introducing a petition ostensibly signed by at least half of the unit employees. At that juncture, the burden shifts to the General Counsel to show that some of the alleged signatures should not be counted. The Chairman concludes that the General Counsel has met that burden.

[10] These employees were Jorge Gonzalez, Maria Isabel Aguilar, and Annais Salicio.

[11] These employees were Norma Calero, Israel Aguilar, Anne Henry, Samuel Miranda, Tania Martinez, Yurima Varela, and Lumise Jean Gilles.

[12] The General Counsel also challenged the validity of several other signatures on the petition based on: the Respondent's admission that it did not have writing exemplars to authenticate three petition signatures; the judge's crediting of one employee's denial that she signed (although her signature on the petition looks the same as in her exemplar); and the

demonstrate an actual loss of majority status and, accordingly, we find that the Respondent's withdrawal of recognition on the basis of that petition violated Section 8(a)(5) and (1).

2. Unilateral changes

We also adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a retroactive wage increase and the EAR group to discuss workplace issues in mid-May at a time when it was still obligated to bargain with the Union.

We similarly agree with the judge that the unilateral implementation of the retroactive wage increase also violated Section 8(a)(3) and (1) because the Respondent intended to discourage employee support for the Union by granting it. On March 28, the Respondent asserted to the Union that it was not in a financial position to discuss wages and suggested a delay in bargaining on wages so that it could determine the financial impact of its new business. In the meantime, the Respondent withdrew recognition, and quickly increased wages even though its general manager credibly testified that its financial position was worse than expected after the startup of the two new accounts. Additionally, the Respondent's senior vice president of operations directly told employees that the wage increase was "a result of" their disaffection. In light of these circumstances, we find that the Respondent gave employees the wage increase to discourage any continued support for the Union and to reward employees for their disaffection from the Union; thus, the Respondent's wage increase not only violated Section 8(a)(5), as discussed above, but also violated Section 8(a)(3) and (1).

C. For the reasons set forth below, we reverse the following unfair labor practice findings made by the judge and dismiss these complaint allegations.

1. Mazier's solicitation of employee disaffection

As previously stated, the Respondent held several orientation seminars for its 50–60 new employees hired between February and April 2001. Truckdriver Jesus Treto is the only witness who testified regarding Mazier's involvement in any of these seminars. Treto credibly testified that Mazier, Sanchez, and Human Resources Manager Grana were present at two orientation seminars, one in early February and another in early April 2001. Approximately 8–10 new employees attended the February session and about 12 new employees attended the April session. Sanchez, who had responsibility for training new drivers, conducted the seminars. At one session, Mazier said that a union attempted to come into the Company 4 or 5 years ago but it did not succeed. Mazier also said that the Company had lived without the union and that employees did not need it.[13]

Beginning about 1 week after the April meeting, Mazier solicited an unspecified number of employees to sign a disaffection petition.[14] These solicitations generally occurred in the Respondent's kitchen work area. There is no evidence that any supervisor observed Mazier's solicitations or was otherwise aware of his activity.

The Board applies common law principles of agency in determining whether to attribute an employee's conduct to the employer. See, e.g., *Electrical Workers Local 98 (MCF Services)*, 342 NLRB No. 74, slip op. at 3 (2004); *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001); *Cooper Industries*, 328 NLRB 145 (1999). Apparent authority results from a manifestation of the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question on behalf of the principal. *Electrical Workers Local 98*, supra; *Pan-Oston Co.*, supra. Either the principal must intend to cause the third person to believe the agent is authorized to act for him or the principal should realize that its conduct is likely to create such a belief. *Pan-Oston Co.*, supra (citing Restatement 2d, Agency, § 27 (1958, comment a)).

Applying these principles here, we agree with the judge that Mazier was the Respondent's agent with respect to his actions and statements during the two orientation seminars he attended. Contrary to the judge, however, Mazier was not shown to have been acting on behalf of the Respondent when he later solicited employees to sign a disaffection petition. Mazier's solicitation did not take place at either of the two orientation seminars he

judge's crediting of another employee's testimony that he was told to sign the petition in order to get a raise. This last employee signed the second page of the petition. The signature lines on the second and third pages of the petition are numbered sequentially after the first page but, unlike the first page, they bear no statement of the petition's purpose. There are 23 signatures on petition pages two and three. The General Counsel contends all of these are invalid.

Considering our finding that a sufficient number of signatures on the petition are invalid so as to preclude a finding a majority of unit employees no longer supported the Union, we need not pass on these additional contentions.

[13] There is no contention that these statements, or any other statements made by Mazier during the orientation seminars, violated the Act. To the extent that the judge's decision could be read to suggest that Mazier "conducted" several orientation seminars with Grana and Sanchez from late February through early April, we disagree. Treto's testimony only demonstrates that Mazier was "present" at two seminars. Sanchez, not Mazier, "conducted" several sessions.

[14] As with many other factual matters, the testimony is unclear as to whether Mazier engaged in solicitation activity prior to April, though it is undisputed that he solicited employee support for a disaffection petition. Signatures on the disaffection petition are dated from April 11 through 16.

attended. Rather, it occurred approximately 1 week after the April seminar, which was the last seminar Mazier attended. An employee opposed to unionization does not become the employer's agent at all times simply because he speaks critically about the union in two employer-sponsored meetings with other employees. This is all the record shows Mazier did here. Further, the record does not establish any link between the orientation seminars and the later solicitations. There is no showing that Mazier's decertification effort was mentioned at the new employee orientation sessions, nor is there any showing as to how many of the employees Mazier solicited were at the orientation seminars he attended.[15]

The judge also inferred the Respondent's apparent authorization of Mazier's solicitation from his breach of a no-solicitation rule in a work area where he *could* have been observed by a supervisor. There is, however, no evidence that any supervisor actually saw Mazier solicit anyone. Furthermore, notwithstanding the no-solicitation rule's existence, there is no record of its enforcement against any employees. Consequently, there is no basis for finding that solicited employees would reasonably infer from the nonenforcement of the no-solicitation rule against Mazier that the Respondent authorized his solicitation activity.

Based on the foregoing, we find that the General Counsel has failed to prove that Mazier acted as the Respondent's agent when soliciting employees to sign the disaffection petition. Therefore, Mazier's role in soliciting support for the disaffection petition is not attributable to the Respondent and it did not violate Section 8(a)(1) as alleged. Accordingly, we shall dismiss this complaint allegation.

2. Showing the video "Little Card, Big Trouble"

As discussed briefly above, from late February to early April, the Respondent showed the video "Little Card, Big Trouble" to new employees during orientation sessions. After discrediting the Respondent's witnesses who testified about why the Respondent showed the video to new employees, the judge found that the Respondent did not have a legitimate purpose for showing the video during the Union's certification year. Considering the screening of the video in the context of Mazier's activities during the same time period, the judge found that Respondent intended to discourage employees' continued support for the Union and concluded that showing the video was part of an effort to decertify the Union in violation of Section 8(a)(1). We disagree.

"Little Card, Big Trouble" is a campaign video prepared by Projections, Inc. for employers to screen to employees during representation campaigns. In the video, fictional union organizers discuss their attempts to solicit union authorization cards from their coworkers. The narrator of the video also comments on the organizers' efforts: "[a card] can obligate you to something you very well might not want any part of. Signing a union authorization card can be like signing a blank check . . . you won't know what the real cost will be until it's too late"; "when [employees] find out that belonging to a union means living with its rules and regulations, and having to pay dues and fines and assessments, well, they aren't so eager to be counted among the union supporters." The video's penultimate points are that "if the union organizers or pushers tell you that better things are automatic with a union, don't believe it" and "if the union becomes your bargaining representative, they, the union agents and representatives, will sit down at a table across from the company, and negotiate. But there are no guarantees, because the company is not required to give in to the union's demands. All the company has to legally do is bargain in good faith." The video does not threaten employees who sign an authorization card or promise employees benefits for not signing a card. It simply encourages employees to "think about" their decision to sign a card.[16]

To begin, the judge's analysis misleadingly suggests that the analysis of this issue turns on the Respondent's motivation for showing the video. On the contrary, "the standard for determining whether a statement violates Section 8(a)(1) is an objective one that considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights, rather than the intent of the speaker." *Smithfield Packing Co.*, 344 NLRB No. 1, slip op. at 2 (2004). Resolution of this issue must take into consideration that Section 8(c) of the Act explicitly recognizes the Respondent's right to express its views about labor issues and unionization, provided it does so in noncoercive terms.[17] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1999).

[15] Adolpho Morales and Alberto Solano, two of the five witnesses who testified that Mazier solicited them, were long-term employees who would not have been involved in the new employee training sessions.

[16] The record contains an English transcript of the video. All or most of the video screenings were in Spanish. The distributor of the video did not comply with a subpoena for the Spanish version. The judge expressed doubt as to whether the English transcript accurately reflected what was shown to employees. Nevertheless, the credited testimony of the General Counsel's witnesses failed to identify any significant differences between what they heard and the summary of the video set out above.

[17] Sec. 8(c) of the Act provides that:

The judge did not find that the content of the video, in and of itself, violated Section 8(a)(1). Clearly it did not. Employer statements must be viewed in context and not in isolation to determine if they have the reasonable tendency proscribed by Section 8(a)(1). See, e.g., *UARCO, Inc.*, 286 NLRB 55, 58 (1987), and cases cited therein. In this instance, neither of the two factors relied on by the judge demonstrate that the video had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of Section 7 rights.

The first factor relied on by the judge was the showing of the video during the Union's certification year. The certification year provides an insulated period during which an incumbent union's representative status cannot ordinarily be challenged. It does not, however, circumscribe an employer's 8(c) right to make noncoercive critical statements about unionization or the considerations a new employee should contemplate before electing to join a union.

The second factor relied on by the judge was Mazier's decertification activity. We have previously found that Mazier did not act as the Respondent's agent while engaged in this activity. In any event, neither the video nor remarks made during the screening of the video make reference to decertification.[18] Further, there is no credible evidence that Mazier made any reference to the video or that he made any threats or promises of benefits to employees based on whether they chose to sign the disaffection petition. Accordingly, we find that the General Counsel has failed to prove that employees would reasonably tend to link Mazier's conduct to the video and to infer from that nexus that they would suffer adverse consequences as a result of supporting the Union.

In sum, the video "Little Card, Big Trouble" merely sets forth the Respondent's privileged views about the potential consequences of signing an authorization card. It contains no threats against employees for signing an authorization card or any promises of benefit for not signing a card nor does its make reference to decertification. The Respondent has as much right under Section 8(c) to convey this noncoercive message during a union's certification year as it does during an organizational campaign. Finally, employees would not reasonably interpret the video as coercive based on Mazier's personal efforts to solicit their support for a disaffection petition. Thus, the video does not rise to the level of interference, restraint, or coercion proscribed by Section 8(a)(1), but is instead protected by Section 8(c).

Our colleague argues that an employer can oppose a union during an organizational campaign, but not after the union has become certified. As she phrases it, "the time for campaigning is over and the free choice of employees must be respected." Similarly, she says that the employer's "continuing the campaign reasonably tends to coerce employees in the exercise of their Section 7 rights because it demonstrates that the employer disfavors their representative and implies that supporting the union will be futile or even lead to reprisals." We disagree. In the first place, it is not unlawful for an employer to express an opinion "disfavoring" the union. Further, noncoercive expressions of opposition to unionization do not necessarily imply that representation by a union is futile or will lead to reprisals. Moreover, the provisions of Section 8(c) do not simply vanish from the Act during a certification year; employers remain free to express views, argument, or opinion on unionization, or the risks and benefits of signing an authorization card, so long as "such expression contains no threat of reprisal or force of promise of benefit." That is true even if as a result of such speech some employees choose not to become union members. Freedom of speech is a core value of our constitutional democracy, and neither the persuasiveness of the speech nor the "context" of a certification year renders otherwise lawful speech unlawful.

Our colleague does not appear to seriously dispute that an employer may lawfully inform employees of their protected choice as to whether to sign an authorization card, even after a union has been certified. However, she finds, like the judge, that the video in question "went much further" and informed new employees not only of that right, but "that it is a problem if you belong" to a union. Had the video suggested or implied that signing an authorization card was a "problem" because of any action the Respondent might take in response, our colleague's argument would be a valid one. However, the video posits that signing a card is a problem because "belonging to a union means living with its rules and regulations and having to pay dues and fines and assessments." The video's expression of opinion as to the general disadvantages of union membership, even if deemed an indirect disparagement of this Union, would be insufficient to establish a violation of Section 8(a)(1). See *Trailmobile Trailer, LLC*, 343 NLRB No. 17, slip op. at 1 (2004), quoting *Sears, Roebuck & Co.*, 305 NLRB 193 (1991) ("[w]ords of disparagement alone concerning a

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> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

[18] We note that the judge did not find that unlawful statements made by Grana and Sanchez at the February 14 orientation seminar had any bearing on employees' perception of the video shown on that date. The judge relied solely on Mazier's conduct in his analysis of this factor.

union or its officials are insufficient for finding a violation of 8(a)(1)").

Finally, we disagree with our colleague's assertion that the unlawful threat of loss of business as a result of unionization made by Grana and Sanchez tainted the video's unrelated and otherwise lawful message concerning the entirely different subject of signing authorization cards. As noted above, the text of the video was noncoercive, it did not encourage or solicit decertification, and it did not question the status of the Union as the certified representative or invite direct dealing. Thus, the video did not have a "coercive effect" in the first instance that could be "exacerbated" by the unrelated threats of Grana and Sanchez.[19] The showing of the video is alleged as a separate violation, and we assess it as such.

Our colleague's reliance on *Armored Transport, Inc.*, 339 NLRB 374 (2003), and *Webco Industries*, 327 NLRB 172 (1998), is misplaced. In the former case, the employer coercively instigated decertification efforts when it circumvented the union by presenting contract proposals directly to employees, "direct[ed] employees as to the certification process by suggesting that they go to the Board to request a new election," and requested employees to file a decertification petition and present the employer with evidence upon which it could withdraw recognition. 339 NLRB at 377–378. The Respondent engaged in no such coercive conduct in displaying the video here. Similarly, in *Webco Industries*, unlike the instant case, the employer took adverse action against employees and then falsely blamed that action on the union, thereby coercively suggesting that seeking union representation results in damage to their terms and conditions of employment. 327 NLRB at 173. Absent such adverse action, or threats, or promises, the expression of opinion as to the merits of union representation remains protected by Section 8(c) notwithstanding certification. Accordingly, we shall dismiss this complaint allegation.

3. Failure to make a wage proposal

As set forth briefly above, on January 31 and March 28, the Respondent suggested a delay in bargaining on wages because of its financial situation. For this same reason, the Respondent did not proffer a wage proposal during the negotiation sessions on those dates.[20] The Union apparently acceded to the Respondent's suggestion by first agreeing on January 31 to conduct an audit of the Respondent's finances before discussing its own wage proposal, and then by agreeing on March 28 to further delay bargaining on wages in the hopes that the Respondent's financial condition would improve following the startup of two new accounts. Given the Union's agreement to the Respondent's proposal to delay discussions on wages, we find that the Respondent's failure to proffer a wage proposal cannot be said to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1). Accordingly, we shall dismiss this complaint allegation.

4. Surface bargaining

The judge also inferred that that the Respondent's January 31 and March 28 claims of financial duress and proposals to delay bargaining on wages were part of a deliberate strategy intended to foment employee discontent and to undermine employee support for the Union. The judge concluded, without explanation or analysis, that "by its overall conduct" between January 31 and April 18, the Respondent failed and refused to bargain in good faith with the Union. Neither the complaint nor the judge's decision specifically reference the Respondent's January 31 or March 28 proposals to delay further bargaining on wages as bases for a finding of bad-faith bargaining. Nor was this conduct alleged as a violation of Section 8(a)(5); thus, the judge's bad-faith finding appears based solely on the Respondent's away-from-the-bargaining-table misconduct.

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table.[21] *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Under this standard, we must decide whether a party is engaging in hard, but lawful, bargaining to achieve an agreement that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Id. In making this determination, the Board examines not only the conduct of the employer but also the conduct of the union. *Aztec Bus Lines*, 289 NLRB 1021, 1042 (1988), and cases cited therein.

[19] Our colleague points to additional statements made by Sanchez that were critical of the Union. However, those statements were not even alleged as unfair labor practices, and also do not taint the message of the video.

[20] This conduct was alleged as an 8(a)(1) violation. The General Counsel did not allege that it was also an 8(a)(5) violation.

[21] Sec. 8(d) of the Act defines the duty to bargain collectively as:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

NLRB v. Insurance Agents, 361 U.S. 477, 485 (1960).

a. The Respondent's negotiations concerning noneconomic issues

The parties' extensive bargaining history leading up to the January 31 bargaining session, as the judge recounts, indicates that the parties met eight times after their initial session in May 2000 and bargained to agreement on nearly all noneconomic issues. The record shows that the parties negotiated in good faith throughout this period. There is no contention to the contrary.

b. The Respondent's negotiations concerning wages

In January, the Union made a wage proposal and requested bargaining on wages. Although the Respondent did not make a wage proposal as the Union had requested, its failure to do so is not evidence of bad faith. First, there is no complaint allegation that the failure to make a wage proposal violated Section 8(a)(5). Indeed, as more fully discussed below, the Union at the very least acquiesced in the delay in bargaining over wages. Second, the Respondent carefully explained that it wished to delay making a counterproposal in the hope that its financial condition would improve and allow it to make a more generous wage proposal than it could make at the time. As further evidence of its good faith, the Respondent offered to allow the Union to audit its financial records to verify its financial condition. Respondent also made a detailed presentation concerning its finances at the March 28 bargaining session to explain the justification for its delay in making a wage proposal. These actions fail to manifest bad faith on the part of the Respondent.

c. The Union's conduct during bargaining

The Union's position on the delay of bargaining concerning wages proposed by the Respondent was anything but consistent. On January 31, the Union agreed to the Respondent's proposal to delay negotiations on wages until after it conducted an audit. In early February, however, the Union demanded a wage proposal from the Respondent before it would conduct the audit. Shortly thereafter, the Union decided not to conduct an audit. On March 28, the Union agreed to delay bargaining on wages until May 3, but filed a refusal to bargain charge on March 29 complaining of the Respondent's failure to bargain on wages the day before. On April 12, again changing its position, the Union withdrew its March 29 charge so as not to interfere with the scheduled bargaining session on May 3. The Union's vacillation on how bargaining was to proceed stands in stark contrast to the Respondent's consistent position that it might be in a position to make a more generous wage proposal after its business improved than it was able to make at that time. It would be anomalous to find bad-faith bargaining, i.e., that the Respondent sought to avoid reaching an agreement, when the parties actually agreed how to proceed with bargaining on wages.

d. The Respondent's away-from-the-bargaining-table conduct

As discussed above, we have found that the Respondent twice violated Section 8(a)(1) between January 31 and April 18, i.e., Grana and Sanchez threatened on February 14 that the Union would interfere with the Respondent's business opportunities and Wilsher coercively interrogated employee Solano in late March. This away-from-the-table misconduct is insufficient to prove overall surface bargaining in the totality of the circumstances of this case. Cf. *River City Mechanical*, 289 NLRB 1503, 1505 (1988).

In *River City Mechanical*, supra, the employer sought to extract substantial economic concessions during negotiations for a successor agreement, but there was no indication of bad faith in its conduct at the bargaining table. Although its conduct away from the table included direct dealing with employees and expressions of intent to go nonunion, the Board found that those unfair labor practices were insufficient to establish overall surface bargaining in the absence of evidence that they influenced the aims or attitudes of the employer's officials in advancing contract proposals on the employer's behalf. Id. at 1505.

Likewise in this case, the Respondent's misconduct away from the table, which is certainly less egregious and less related to the bargaining process than the employer's misconduct in *River City Mechanical*, has not been shown to have influenced its conduct at the bargaining table. Rather, as discussed above, the Respondent bargained in good faith concerning noneconomic items and delayed making a wage proposal simply because the Union agreed to do so. The Respondent's unfair labor practices may "show the Respondent's animus against the Union; but they do not provide a sufficient indicia of bad-faith bargaining to warrant the finding of a [surface bargaining] violation in the circumstances of this case." *Hostar Marine Transport Systems*, 298 NLRB 188, 197 (1990). Accordingly, we shall dismiss this complaint allegation.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) Threatening employees on or about February 14, 2001, with loss of business opportunities due to their support for the Union.

(b) Threatening in May 2001 to withhold wage increases due to employees' support for the Union.

(c) Informing employees in or around early May 2001 that they were receiving wage increases as a reward for decertifying the Union.

(d) Informing employees on or about May 7, 2001, that it was replacing the Union with an EAR group to address employee grievances.

(e) Informing employees in April 2001 of its unlawful withdrawal of recognition and saying to employees that the Union was no longer their collective-bargaining representative.

(f) Coercively interrogating an employee on March 28, 2001, about his union membership, activities, and sympathies.

(g) Informing employees on or about May 7, 2001, that they were receiving wage increases that the Union was not able to obtain for them as a reward for decertifying the Union.

4. By implementing retroactive wage increases for employees in the involved unit to discourage employees from joining, supporting, and assisting a union and engaging in concerted activities, the Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act.

5. By engaging in the following conduct, the Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (5) of the Act:

(a) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit on or about April 18, 2001.

(b) Failing and refusing to meet and bargain with the Union upon request since on or about April 18, 2001.

(c) Creating an EAR group in or around early May 2001 as a replacement for the Union to deal directly with employees concerning terms and conditions of employment, which are mandatory subjects for the purposes of collective bargaining, without giving the Union notice and an opportunity to bargain.

(d) Implementing in mid- to late May 2001 retroactive wage increases, which relate to the terms and conditions of employment and are a mandatory subject for the purposes of collective bargaining, for employees in the unit without giving the Union notice and an opportunity to bargain.

6. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated the Act in any other manner.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmative Bargaining Order

The judge recommended an affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition, but did not justify the imposition of such an order as required by the United States Court of Appeals for the District of Columbia Circuit. Nevertheless, for the reasons set forth below, we agree with the judge that an affirmative bargaining order is warranted on the facts of this case.[22]

The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738. Consistent with the court's requirement, we have examined the particular facts of this case and we find that

[22] The General Counsel and the Respondent both argued that the remedy should be imposed pursuant to *Mar-Jac Poultry*, 136 NLRB 785, 787 fn. 6 (1962) (ordering employer to bargain with union for at least the balance of the certification year remaining after the employer refused to bargain). Given our reversal of the judge's bad-faith bargaining during the certification year finding above, however, *Mar-Jac Poultry* is inapplicable.

a balancing of the three factors warrants an affirmative bargaining order.[23]

First, an affirmative bargaining order vindicates the employees' Section 7 rights by providing the employees, who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition, with the opportunity to negotiate and execute an initial collective bargaining agreement. This is particularly important given the status of bargaining at the time of the withdrawal of recognition, where the parties had been bargaining since May 2000, had resolved noneconomic issues, and the Respondent, by its unilateral postwithdrawal wage increase, signaled its ability and willingness to address unit employees' key economic concern. At the same time, an affirmative bargaining order does not unduly burden the Section 7 rights of employees who might oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the Respondent's unlawful withdrawal of recognition.

Second, an affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it gives the parties a reasonable period of time to resume negotiations and to execute a collective-bargaining agreement if those negotiations are successful. It also ensures that the Union will not be pressured, by the possibility of another challenge to its majority status, to achieve immediate results at the bargaining table—results that might not serve the best interests of the bargaining unit employees.

Third, a cease-and-desist order without the temporary bar on challenges to the Union's majority status attendant to an affirmative bargaining order would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain violations because it would allow another such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair in light of the Union's need to reestablish its representative status with unit employees after the Respondent gave them a wage increase as a reward for the Union's decertification and created an EAR group to replace the Union as the medium for discussion of workplace issues. These circumstances outweigh the temporary impact an affirmative bargaining order will have on the rights of those employees who oppose continued union representation.

[23] Chairman Battista and Member Schaumber do not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." They agree with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 546 fn. 6 (2003). They recognize, however, that the view expressed in *Caterair International*, supra, represents extant Board law.

Rescission of unilateral changes

Consistent with the Board's usual remedial practice, we have modified the judge's recommended remedy for the Respondent's unlawful unilateral wage increase to require the Respondent, upon request by the Union, to rescind the wage increase it granted employees after withdrawing recognition from the Union. *Jerry Cardullo Ironworks, Inc.*, 340 NLRB No. 69, slip op. at 2 (2003); *Saginaw Control & Engineering*, supra at 547. We shall also include an affirmative provision requiring the Respondent to disestablish the EAR group it unilaterally created to replace the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Flying Foods Group, Inc. d/b/a Flying Foods, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of business opportunities due to their support for Hotel Employees & Restaurant Employees International Union Local 355, AFL–CIO.

(b) Threatening to withhold wage increases due to employees' support for the Union.

(c) Informing employees that they are receiving wage increases as a reward for decertifying the Union.

(d) Informing employees that it was replacing the Union with an EAR group to address employee grievances.

(e) Informing employees of its unlawful withdrawal of recognition and saying to employees that the Union was no longer their collective-bargaining representative.

(f) Coercively interrogating an employee about his union membership, activities, and sympathies.

(g) Informing employees that they were receiving wage increases that the Union was not able to obtain for them as a reward for decertifying the Union.

(h) Implementing retroactive wage increases for employees in the involved unit to discourage employees from joining, supporting, and assisting a union and engaging in concerted activities.

(i) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the following appropriate unit:

All full-time and regular part-time transportation employees, drivers, helpers, dispatch clerks, kitchen employees, equipment flight set-up employees, storeroom employees, dishroom employees, production employees (hot, cold, cutlery/packing, tray set-up, dessert, and cooks), porters, flight coordinators, lead persons in cold food, dishroom, storeroom, and equipment flight set-up, the transportation hourly supervisor, and the storeroom hourly supervisor, employed by the Employer at its Miami, Florida location; excluding all office clerical employees, storeroom clerks, maintenance employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(j) Failing and refusing to meet and bargain with the Union upon request.

(k) Creating and maintaining an EAR group as a replacement for the Union to deal directly with employees concerning terms and conditions of employment, which are mandatory subjects for the purposes of collective bargaining, without giving the Union notice and an opportunity to bargain.

(l) Implementing retroactive wage increases, which relate to the terms and conditions of employment and are a mandatory subject for the purposes of collective bargaining, for employees in the unit without giving the Union notice and an opportunity to bargain.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the above-mentioned unit concerning wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

(b) Disestablish the EAR group and, on request of the Union, rescind the unilateral wage increase granted to employees in May 2001.

(c) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be posted in both English and Spanish. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent, Flying Foods Group, Inc. d/b/a Flying Foods, at any time since February 14, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 25, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring and dissenting in part.

Provided it does not make threats or promises, an employer is free to campaign against a union that seeks to represent its employees. But once employees have freely chosen union representation, the employer may not disparage the union or solicit employees to seek decertification of the union.[1] In other words, the time for campaigning is over and the free choice of employees must be respected. Continuing the campaign reasonably tends to coerce employees in the exercise of their Section 7 rights, because it demonstrates that the employer disfavors their representative and implies that supporting the union will be futile or even lead to reprisals. Here, the majority errs in endorsing the Respondent's repeated showing of an antiunion video to new employees *after*

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See, e.g., *Armored Transport, Inc.*, 339 NLRB 374, 377–378 (2003). See also *Webco Industries*, 327 NLRB 172, 173 (1998) ("Although an employer is generally free to make critical comments about a union that is seeking to organize its employees, it violates Section 8(a)(1) of the Act when it takes adverse action against employees and falsely blames its action on the union.").

the Union had been certified and while it sought to negotiate a first contract, in the context of other unfair labor practices.

I.

The Respondent held a series of orientation seminars for new employees from late February through early April 2001.[2] At the February 14 seminar, conducted by Human Resources Manager Daysma Grana and senior employee Angel Sanchez (who was acting as an agent of the Respondent during these seminars), Sanchez told the new employees that the Union was no good for them; that it was only interested in strikes, not in benefits for the employees; that the employees would have more benefits without the Union; and that the only thing the Union would do would be to take money out of the employees' pockets. My colleagues and I agree that Grana and Sanchez also unlawfully threatened the employees that the Union would prevent the Respondent from getting new business.

During these seminars, the Respondent showed the antiunion video "Little Card, Big Trouble," which warned the new employees that "[s]igning a union authorization card can be like signing a blank check . . . you won't know what the real cost will be until it's too late" and "once employees start to find out the truth about unions, a lot of them will change their minds about wanting a union in their lives." The video also declared that one of the basic reasons employees turn to a union is because they want to hurt management. Finally, the video proclaimed that if the employees do not have any real problems, then the union creates them.

In late February or early March, and continuing through mid-April, employee Dario Mazier solicited employees to sign a petition stating that they did not want to be represented by the Union. On April 18, about 2 weeks after the Respondent's latest showing of "Little Card, Big Trouble," the Respondent received a petition purportedly signed by a majority of its employees, declaring that they no longer wished to be represented by the Union. The Respondent immediately and (as my colleagues and I find) unlawfully withdrew recognition of the Union.

II.

The Respondent's repeated showing of "Little Card, Big Trouble" was an obvious attempt to undermine employee support for the incumbent Union and to solicit employee support for the decertification movement. Newly-hired employees watching the video would reasonably infer that supporting the Union, despite their employer's disfavor, could bring reprisals. Here, context is crucial.[3]

As my colleagues note, this antiunion video was produced by another company for employers to show to their employees during union organizational campaigns. But the Union's organizational campaign had long since been successfully completed by the time the Respondent began to show the video. The Union had won the right to represent the Respondent's employees, it was still in its certification year, and it was in contract negotiations with the Respondent. Furthermore, the coercive effect of the video was exacerbated by the unlawful threats made by Grana and Sanchez at the February 14 seminar that the presence of the Union would prevent the Respondent from getting new business.[4]

The judge correctly found that the Respondent was not on the same footing as an employer trying to convince its employees, during a union organizational campaign, not to sign a union authorization card or support a union. The Union here was in place as the certified collective-bargaining representative. The judge also correctly found that the "Little Card, Big Trouble" video went much further than simply explaining that the employees had a choice about whether to sign a union authorization card. He found that the message conveyed to the employees by the video was "not just that they had a right not to belong to the Union but that it is a problem if you belong." I agree with the judge. Negotiating a first contract is difficult in the best of circumstances. But negotiating a first contract while this message was bombarded to new employees (likely more vulnerable to coercion than the veteran work force) would virtually guarantee that the Union would be undermined and that the negotiations would fail. In fact they did.[5]

[2] The Union's certification year ran through March 28, 2001. All dates are 2001, unless stated otherwise.

[3] The administrative law judge in *Sodexho Marriott Services*, 335 NLRB 538, 547, 555 (2001), found that a video styled "Little Card - Big Trouble" was legitimate campaign propaganda. But there were no exceptions to that finding, and the case therefore has no precedential force. In any event, here the Union was the incumbent bargaining representative, while in *Sodexho Marriott* the video was shown during the union's organizational campaign.

[4] My colleagues note that the judge did not find that the unlawful threats made by Grana and Sanchez at the February 14 orientation seminar had any bearing on the employees' perception of the video shown on that date. But the judge also did not find that the threats *lacked* any such bearing—and, of course, it is the reasonable tendency of the video to coerce employees (and not actual coercion) that matters. Surely the unlawful threats tended to exacerbate the video's antiunion message.

[5] It seems clear that the Respondent's repeated showing of the antiunion video from late February through early April encouraged the antiunion sentiment expressed in the April 18 employee petition to get rid of the Union. Indeed, after being shown the video, employee Hector Rodriguez and a fellow employee, both of whom had earlier signed

In reversing the judge's unfair labor practice finding, the majority says that the Respondent's repeated showing of the antiunion video to employees was merely a noncoercive expression of the Respondent's critical views about unionization and the considerations that a new employee should contemplate before deciding whether to join a union. Citing Section 8(c) of the Act, my colleagues insist that the Respondent was entitled to convey this message not only during the organizing campaign, but also *after* employees had freely chosen union representation.

But, as I have explained, the likely effect of the message is fundamentally different when the union has been certified. In that context, what once may have been legitimate campaign propaganda becomes an implicit threat, at least under the circumstances present here. When newly-hired employees are told that endorsing the incumbent union is like signing a blank check, that employees turn to unions in order to hurt management, and that unions create employees' problems, they understandably will hesitate to support the union, even though it has been certified to represent them. This is coercion, not persuasion.[6] Accordingly, I would find that the Respondent violated Section 8(a)(1) of the Act, as alleged, by soliciting its employees to decertify the Union by showing them the antiunion video in question.[7]

III.

I agree with the results reached by the majority in all other respects.

While I find the Respondent's course of conduct during contract negotiations troubling—it suggests that the Respondent was stalling in order to get through the Union's certification year—the Board unanimously finds that the Respondent unlawfully withdrew recognition and thereafter refused to bargain with the Union. I am satisfied that our affirmative bargaining order remedy for those violations will satisfactorily restore the Union to the status quo ante.

Finally, with regard to the General Counsel's request that the Union's certification year be extended under *Mar-Jac Poultry*, 136 NLRB 785 (1962), I am satisfied that ordering the Respondent to bargain in good faith with the Union for a reasonable period of time is sufficient to remedy the Respondent's unlawful withdrawal of recognition and refusal to bargain. Under *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002), such a reasonable period of time for bargaining, before the Union's majority status can be challenged, is at least 6 months.

Dated, Washington, D.C. August 25, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with the loss of business opportunities due to your support for Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO.

WE WILL NOT threaten to withhold wage increases due to your support for the Union.

WE WILL NOT inform you that you are receiving a wage increase as a reward for decertifying the Union.

WE WILL NOT inform you that we are replacing the Union with an EAR group to address your grievances.

WE WILL NOT inform you of our unlawful withdrawal of recognition of the Union or say to you that the Union is no longer your collective-bargaining representative.

WE WILL NOT coercively interrogate you about your union membership, activities, and sympathies.

authorization cards, told Sanchez that, having seen the video, they realized that they had gotten into "a big problem and . . . wanted to get out." Some days later, Rodriguez signed the employee petition to get rid of the Union.

[6] That the employees were new, and, thus, had not participated in the union-election process, did not entitle the Respondent to launch a coercive campaign aimed at them, however tempting that might have been.

[7] In light of my agreement with this unfair labor practice finding, I need not pass on my colleagues' reversal of the judge's finding that employee Dario Mazier was acting as the Respondent's agent in unlawfully soliciting employee support for the decertification petition. Such an unfair labor practice finding would be cumulative.

WE WILL NOT inform you that you are receiving a wage increase that the Union was not able to obtain for you as a reward for decertifying the Union.

WE WILL NOT implement retroactive wage increases for you to discourage you from joining, supporting, and assisting a union and engaging in protected, concerted activities.

WE WILL NOT fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of the following appropriate unit:

> All full-time and regular part-time transportation employees, drivers, helpers, dispatch clerks, kitchen employees, equipment flight set-up employees, storeroom employees, dishroom employees, production employees (hot, cold, cutlery/packing, tray set-up, dessert, and cooks), porters, flight coordinators, lead persons in cold food, dishroom, storeroom, and equipment flight set-up, the transportation hourly supervisor, and the storeroom hourly supervisor, employed by the Employer at its Miami, Florida location; excluding all office clerical employees, storeroom clerks, maintenance employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

WE WILL NOT fail or refuse to meet and bargain with the Union upon request.

WE WILL NOT create and maintain an EAR group as a replacement for the Union to deal directly with you concerning terms and conditions of employment, which are mandatory subjects of collective bargaining, without giving the Union notice and an opportunity to bargain.

WE WILL NOT unilaterally implement retroactive wage increases, which relate to terms and conditions of employment and are a mandatory subject of collective bargaining, for you with giving the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the unit concerning wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

WE WILL disestablish the EAR group we created to replace the Union and, upon request by the Union, WE WILL rescind the unilateral wage increase we granted you in May 2001.

FLYING FOODS GROUP, INC. D/B/A FLYING FOODS

Shelley B. Plass, Esq., for the General Counsel.

Harvey M. Adelstein, Esq., Harry J. Secaras, Esq. and *Amy J. Zdravecky, Esq. (Neal, Gerber & Eisenberg),* of Chicago, Illinois, for the Respondent.

Kathleen Phillips, Esq. (Phillips, Richard, & Rind, P.A.), of Miami, FLorida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO (HERE or the Union) filed charges against Flying Foods Group, Inc. d/b/a Flying Foods (Respondent). A consolidated complaint and notice of hearing was issued on September 28, 2001. It alleges that the Respondent (a) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by (1) failing and refusing since on or about January 30, 2001, to provide a wage proposal to the Union; (2) showing antiunion videos to employees and thereby soliciting employees to decertify the Union; (3) threatening employees with loss of business opportunities due to their support for the Union; (4) threatening to withhold wage increases due to employees' support for the Union; (5) informing employees that they were receiving wage increases as a reward for decertifying the Union; (6) informing employees that it was replacing the Union with an "EAR" group to address employee grievances; (7) threatening employees with discharge if they contacted the Union or the Board about disciplinary issues; (8) soliciting employee support of a petition to decertify the Union; (9) promising employees wage increases and other benefits if they decertified the Union; (10) telling the employees that the Union was decertified and no longer represented them; (11) interrogating employees about their union membership, activities, and sympathies; (12) informing employees that they were receiving wage increases that the Union was not able to obtain for them as a reward for decertifying the Union; (13) informing employees that they were receiving wage increases as a reward for decertifying the Union; and (14) threatening employees with discharge due to their union membership, activities, and sympathies; (b) violated Section 8(a)(1) and (3) of the Act by taking certain actions because employees of Respondent joined, supported, and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities, namely: (1) implementing a retroactive wage increase for employees in the unit; (2) verbally reprimanding Luis Hurtado; (3) issuing a first final warning to Luis Hurtado; (4) suspending Luis Hurtado for 4 days; and (5) issuing two final warnings to Luis Hurtado; and (c) violated Section 8(a)(1) and (5) of the Act by: (1) withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit; (2) failing and refusing since withdrawing recognition to meet and bargain with the Union upon request; (3) failing and refusing by its overall conduct, including the conduct described above, to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit; and (4) without giving the union notice and an opportunity to bargain: (a) creating an "EAR" group as a replacement for the Union to deal directly

with employees concerning terms and conditions of employment; and (b) implementing retroactive wage increases for employees in the unit. The Respondent denies violating the Act as alleged.

A hearing was held on March 18–22, May 6–10, and June 10–13, 2002, in Miami, Florida. Upon the entire record[1] in this proceeding, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel and the Respondent on August 9, 2002, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Illinois corporation, with a place of business in Miami, has been engaged in providing meals, beverages and food service equipment[2] to the airline industry, including certain airlines that operate out of Miami International Airport. The complaint alleges, the Respondent admits, and I find that at all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Raul Burgos, who is the senior vice president of operations of the Respondent, is responsible for the operations of the 10 facilities that the Respondent has in the United States.[3] The entities operated by Flying Food Group include: (1) Flying Foods Serve Air Miami, Inc. LLC; (2) Flying Foods Fair, Inc.; (3) Flying Foods Services, Inc.; (4) Flying Foods Catering, Inc.; (5) Flying Foods Services of Shanghai, Inc.; and (6) Flying Foods Group, Inc. The Company filed a name change request form with the Department of Florida Division of Corporations in 2001 but Burgos could not recall the exact name that was given to the new entity which operates out of the Miami facility at 1650 N.W. 70th Avenue.

According to General Counsel's Exhibit 4, which is a summary prepared by the Respondent in response to a subpoena duces tecum of counsel for the General Counsel, the Respondent, as here pertinent, serviced the following accounts between November 2000 and August 2001: Air Jamaica, Air France, Martin Air, Falcon Air, World Airways, Tampa Cargo, Northwest Airlines, Copa Airlines, Alitalia, United Parcel Post, Cargo Lux, American Transair, BWIA, Aeromar, Gemini, and D.H.L. Burgos believed that at the time of the trial herein the Respondent continued to provide service to all of these companies, except World Airways, but he was not sure if the Respondent continued to provide service to Tampa Cargo, Cargo Lux, and Aeromar. Respondent has provided service to Air Jamaica since the Respondent purchased the business from Alfa Foods in 1996, and Respondent began to provide service to Air France on March 28, 2001, and to Northwest Airlines on April 1, 2001. Before November 2000, Respondent provided service to Martin Air, Falcon Air, World Airways, Tampa Cargo, Copa Airlines, Alitalia, United Parcel Post, American Transair, BWIA, Aeromar, Gemini, and D.H.L. Burgos was not sure when the Respondent began to provide service to Cargo Lux. Respondent provided service to Asera from December 2001 until February 2002.

Alberto Solano, who worked as a dishwasher and then in general maintenance in the kitchen for the Respondent at the involved facility, testified that Monica Wilsher, the controller of the Respondent at the involved facility, asked him in the presence of Respondent's then General Manager Dave Diamond to speak to the employees in his department about voting for the Respondent in the upcoming election conducted by the National Labor Relations Board (the Board). Solano told the employees that the Company needed their votes. Wilsher introduced Solano in December 1999 to a man he identified as Carlos who Wilsher indicated was the one who was going to represent the Company in the election. Solano testified that Wilsher told him that "they would have a salary increase for all the employees if the company won. If the company didn't win they wouldn't get any because they had to wait for the process to negotiate with the union and all that." (Tr. 371.) Wilsher testified that Solano kept coming to her, he would tell her what was going on, and he was trying to get support in the dish room area for the Company; and the she never offered Solano a reward for his support of the Company during the 1999 election. On redirect, Wilsher testified that she never sought Solano out for assistance during the campaign.

The Union won the December 17, 1999 Board election at the Respondent's Miami facility. The Respondent filed objections to the election.

Solano testified that he spoke with Carlos in the lunchroom as the votes were counted and Carlos said that although the Company lost, there would be a period of time before the results were legal.

Two days later, Wilshire called Solano in his working area and she told him that Carlos was the representative of the Company. Solano authorized Wilshire to give his telephone number to Carlos.

The next day Wilshire asked Solano, while they were in Wilshire's office, if Carlos had spoken with him, and when he told

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[1] To the extent that the motions of the Respondent and counsel for the General Counsel to correct the record are unopposed, they are hereby granted. The Respondent's motion to correct the transcript, counsel for the General Counsel's motion to correct transcript and response to Respondent Flying Food's Motion to correct the transcript, and Respondent's response to counsel for the General Counsel's motion to correct the transcript and reply to Respondent Flying Food's motion to correct the transcript are received in evidence as R. Exh. 47; GC Exh. 69; and R. Exh. 48, respectively. The Respondent's unopposed corrections should be corrected as follows: [Corrections to the transcript have been noted and corrected.]

[2] The equipment (food carts) is owned by the airline and the Respondent is responsible for housing and maintaining it.

[3] They include facilities at Newark, New Jersey; New York, New York; Orlando and Miami, Florida;, two in Chicago, Dallas, Texas, Los Angles, and San Francisco, California, and Seattle, Washington. The employees at Midway in Chicago, Illinois, and at JFK in New York, New York, are represented by labor unions. At the time of the trial herein, the Respondent was negotiating with respect to a collective bargaining agreement for its employees at San Francisco.

her that Carlos had not called, Wilshire telephoned Carlos and handed the telephone to Solano. Carlos told Solano that he needed to speak with him and Solano gave Carlos his home telephone number. Shortly after 11 p.m. that night Carlos telephoned Solano and told him that he wanted Solano to "make a sworn affidavit against Adolfo [Morales] and Jim" (Tr. 373), who are employees of the Respondent, indicating that he had seen them pressuring or assisting with the other employees to vote in favor of the Union. Solano told Carlos that he had not seen them do this and he could not make such a declaration. Carlos told Solano to think about it and Carlos said that he would not pressure Solano. Carlos also told Solano that it could result in better benefits for him and a much better position. Finally, Carlos told Solano that he was trying to find a way to appeal the election and annul the results.

Wilsher testified that she did not know who Carlos Rodriguez is; that she did recall someone by the name of Carlos Rodriguez (As noted below, apparently this is not his correct surname.), who the Company hired to help it with the organizing campaign; that she did not know what firm he is affiliated with, where he works out of, or the reason he was hired; that Rodriguez was there to tell those in management what they could and could not say or do to the employees; that she did not think that Rodriguez met with the employees; that she did not know if Rodriguez met with management; that after the election she was not sure what involvement he had with the election process; that she had conversations with Rodriguez after the election "we kind of established kind of like a friendship" (Tr. 1082), but she could not remember what their conversations were about; that if Rodriguez was at the Respondent's Miami facility after the election, it would have been for business purposes; that since the Board election she has had contact with Rodriguez by e-mail; and that no other employee other than Solano approached her with respect to assisting with the campaign. On redirect, Wilsher testified that Rodriguez helped then General Manager David Diamond prepare his remarks to employees. Subsequently Wilsher testified that she did not recall but it was possible that she spoke with Rodriguez on the telephone after the Board election; and that she thought that at one time he gave her his cellular telephone number but she could not remember his area code.

Five or six days later, Carlos telephoned Solano and asked him if he had thought about the proposal. Solano told Carlos that he did not want to make that kind of a statement. Carlos told Solano that if he did not make that kind of declaration the Union would win. Solano did not tell Wilshire anything about Carlos' request.

Burgos testified that he attended employee meetings during the organizing campaign; that neither he not Vidal spoke at these meetings; and that General Manager Dave Diamond and consultant Carlos Respuro (identified above as Rodriguez), who he hired, spoke to the employees at these meetings. Subsequently Burgos testified that he approved the hiring of Respuro, who did not testify at the trial herein.

In early March 2000, Andre Balash, the secretary treasurer and business manager of the Union, telephoned the Respondent's attorney, Harvey Adelstein, in Chicago, Illinois, indicating that he was going to be in Chicago for other business and would like to meet Adelstein and a representative of the Respondent to set up dates with the Respondent to begin negotiations.

On March 16, 2000, Balash met with Adelstein and Burgos in a restaurant in Chicago. According to the testimony of Balash, Burgos said the Company in Miami was not doing well, it was a "bleeding cow" (Tr. 110), and the Respondent was going to try to get a contract but if things did not turn around soon, the Respondent would consider getting out of the Miami market. On cross-examination, Balash testified initially that at this meeting the parties agreed to negotiate the noneconomics first. Subsequently, Balash testified that he misspoke and that this agreement occurred at the May 24, 2001 meeting. Burgos testified that Raymond Moss, who was the director of human resources at the time, attended this meeting; that at this meeting he told Balash that the Miami operation was in a serious financial situation; it was a "hemorrhaging . . . sick puppy." (Tr. 1171.) Also, Burgos testified that at this meeting, Balash agreed to cover all noneconomic issues before they got into the economic issues. Adelstein testified that at this meeting Balash indicated that they should be talking about noneconomics before they talked about economics, and the Respondent agreed to that procedure.

On March 29, 2000, the Union was certified as the exclusive collective-bargaining representative of the involved unit.[4]

By letter dated March 29, 2000, (GC Exh. 15), Balash advised Adelstein as follows:

> I was glad to have had the opportunity to meet with yourself and your client. I truly hope that we will be able to establish a healthy labor management relationship.
>
> Please give me a call at your earliest convenience; if your client would like to further our discussions on how we might be able to reach a fair agreement.

Soon after this, Balash informed Adelstein that he had to be in Chicago again to negotiate a national contract and he wanted to meet with Adelstein and Burgos to discuss possible negotiating dates.

In mid-April 2000, Balash met Adelstein and Burgos in Adelstein's office in Chicago. They selected May 24 and 25, 2000, for negotiations. Burgos testified that he, along with Adelstein, was responsible for negotiating a collective-bargaining agreement; that they met Balash in Adelstein's office and then they went to the same restaurant they went to for the prior meeting; and that he reiterated that the Miami opera-

[4] GC Exh. 14. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All full-time and regular part-time transportation employees, drivers, helpers, dispatch clerks, kitchen employees, equipment flight set-up employees, storeroom employees, dishroom employees, production employees (hot, cold cutlery/packing, tray set-up, dessert and cooks), porters, flight coordinators, lead persons in cold food, dishroom, storeroom, and equipment flight set-up, the transportation hourly supervisor and the storeroom hourly supervisor employed by the Employer at its Miami, Florida location; excluding all office clerical employees, storeroom clerks, maintenance employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

tion was a very sick puppy and the noneconomics would be resolved before getting into the economics. Adelstein testified that at this meeting Balash was advised that the Company was in the process of renegotiating its health insurance program and Balash said that he would have no problem if the Respondent put it into effect before negotiations began. On cross-examination, Adelstein testified that at both this and the earlier meeting with Balash, it was agreed that the noneconomic issues would be discussed first.

On May 24, 2000, Balash, union organizer Marcos Armero, and the employee bargaining committee met at 10 a.m. at the La Quinta hotel in Miami with Adelstein, Burgos, Diamond, and Daysma Grana, who is Respondent's human resources manager.[5] The Union submitted a proposed collective-bargaining agreement to the Respondent at this session (GC Exh. 16), and the Respondent submitted noneconomic proposals, General Counsel's Exhibit 17, to the Union.[6] The meeting lasted from 2 to 3 hours. As noted above, Balash testified that at this meeting the parties agreed that noneconomics would be discussed first. Burgos testified that he and Adelstein served as the Company's chief spokespersons; that he had full authority to agree to proposals on behalf of the Company and he informed the Union of this; that Balash served as the Union's chief spokesperson; that proposals were exchanged; that the Union had an economic proposal and after some discussion it was indicated that economics would be covered after the noneconomics were agreed to; that the union committee members did not object to discussing the noneconomic proposals first; and that it was agreed that while they would sign off on provisions as they negotiated, there was no agreement until there was agreement on the entire contract. Burgos also testified that Adelstein was a spokesman for the Respondent but Adelstein did not have authority to bind the Respondent to proposals and to the contract agreement; that he had final authority in this regard; and that this was not the first occasion when the Respondent did not have an economic proposal at the beginning of bargaining but on the other occasions it did not involve the Union involved herein. Adelstein testified that he was the chief spokesman for the Respondent in the negotiations along with Burgos; that he had authority to bind the Company for a new collective-bargaining agreement but he would always confer with Burgos regarding operational issues; and that he took notes on a yellow pad and on the union and company written proposals. The Respondent's Exhibits 21 and 22 are the Company's noneconomic proposal and the Union's proposals of May 24, 2000, respectively. Both contain handwritten notes of Adelstein. And Respondent's Exhibit 23 is a copy of the notes that Adelstein took on a legal pad at this session. On rebuttal, Balash testified that during the first negotiating session none of the proposed articles were okayed by the parties, there were no changes made to the language of any of the provisions proposed at that meeting, and no articles were signed off on at that time.

On May 25, 2000, Balash, Armero, and the employee bargaining committee met at the La Quinta hotel in Miami with Adelstein, Burgos, Diamond, and Grana. The Union modified its health and welfare proposal, and it advised the Respondent that it would be willing to go over the Respondent's noneconomic proposal, vis-a-vis trying to work with both documents, because the structure was similar to the Union's proposal. The Union's modified medical proposal, which was given to the Respondent at this meeting, was received as General Counsel's Exhibit 18.[7] Balash testified that Adelstein put it aside and when Adelstein said that they would go through the noneconomic proposals first he agreed. The parties went through the Respondent's proposal but they did not reach any agreements at this 4-hour meeting. On cross-examination, Balash testified that at either this or the May 24, 2000 session Burgos said that the Company was a bleeding cow, it was hemorrhaging, and this was a recurring theme throughout the negotiations he had with Burgos. Balash testified that the Union wanted to meet in June but since Burgos had a busy schedule, the parties agreed to meet on July 11 and 12, 2000. Burgos testified that the parties mutually agreed to meet again on July 11 and 12, 2000. Respondent's Exhibit 24 is a copy of the notes Adelstein took at this session. Adelstein testified that at this session the parties, among other things, discussed tentatively approving provisions so that they would not have to be renegotiated.

On July 11, 2000, Balash, Armero, and the employee bargaining committee met at the La Quinta hotel in Miami with Adelstein, Burgos, Diamond, and Grana. During this 4-hour bargaining session the parties reached agreement on some of the noneconomic proposals. Respondent's Exhibit 25 is a copy of the notes that Adelstein took at this session. Adelstein sponsored Respondent's Exhibit 26, which are a variety of company or union proposals in addition to those exchanged on March 24, 2000.[8]

On July 12, 2000, Balash, Armero, and the employee bargaining committee met at the La Quinta hotel in Miami with the Respondent. During this 4-hour bargaining session the parties reached agreement on some language. Balash testified that the Union wanted to meet in August but the Respondent could not so they arranged to meet on September 6 and 7, 2000. Burgos testified that Balash said that he was tied up in August and the parties mutually agreed to meet in September. Respondent's Exhibit 27 is a copy of the notes Adelstein took at this session. On rebuttal Balash testified that when the parties were scheduling the next session neither he nor Armero was unavailable in

[5] It was stipulated that Adelstein is a partner in the law firm of Neal, Gerber & Eisenberg in Chicago.

[6] The Union's wage proposal for all bargaining unit employees reads as follows:

1st Year $2.00 per hour
2d Year $ .60 per hour
3d Year $ .60 per hour

The sheet, GC Exh. 18 without the modifications noted thereon, titled "Local 355 Economic Proposals for Flying Food Group in Miami," also contains a "Medical Benefit Proposal."

[7] A clean version of GC Exh. 18 was presented to the Company on May 24, 2000. The version of this exhibit with the handwritten notations on it was presented, as noted, to the Company on May 25, 2000.

[8] At one point, Adelstrin mistakenly testified that this meeting occurred on June 11, 2000. He later corrected his testimony.

August 2000, and that Adelstein said that Burgos was not available in the month of August.

On September 6, 2000, Balash, Armero, and the employee bargaining committee met at the La Quinta hotel in Miami with Adelstein, Burgos, Diamond, and Grana. During this 4-hour bargaining session the parties reached agreement on some of the noneconomic provisions. On cross-examination, Balash testified that Burgos stated at this session that the Respondent did not get the British Airways account but he did not recall Burgos saying that there might be layoffs as a result of this. Respondent's Exhibit 28 is a copy of the notes Adelstein took at this session.

On September 7, 2000, Balash, Armero, and the employee bargaining committee met at the La Quinta hotel in Miami with Adelstein, Burgos, Diamond, and Grana. During this 4-hour bargaining session the parties reached agreement on some of the noneconomic proposals, and it was decided to type up (1) what was tentatively agreed upon, and (2) what had not been agreed upon. According to Balash's testimony, the parties agreed to meet on October 18 and 19, 2000. Burgos testified that the parties agreed to meet in October 19 and 20, 2000. Respondent's Exhibit 29 is a copy of the notes Adelstein took on Spetember 7, 2000.

Balash testified that prior to the October 18, 2000 meeting, the employee bargaining committee informed the Union that they had heard that the Respondent was going to merge with a competitor and the employees were concerned.

On October 18, 2000, according to the testimony of Balash, he, Armero, and the employee bargaining committee met at the La Quinta hotel in Miami with Adelstein, Burgos, Diamond, and Grana. Balash testified that the Respondent gave the Union the tentative agreement that the Respondent had typed; that the Union brought up what it had heard about a merger and it proposed incorporating successor language in the collective-bargaining agreement; that Adelstein told him that he was hallucinating but Adelstein would look at whatever language Balash proposed; that he told Adelstein that he would go to the Union's international council to have the language drawn up and he would send it to the Respondent; and that negotiations broke off at that point because successor language was "key" (Tr. 130), if there was going to be a merger. The "TENTATIVELY AGREED UPON PROVISIONS" and "NON-AGREED UPON, NON-ECONOMIC ISSUES" which were given to the Union at this October 19, 2000 meeting, were received as General Counsel's Exhibits 19 and 20, respectively. On cross-examination, Balash testified that it was possible that Burgos was delayed and he did not arrive for this session; that the negotiations were not continued for him to review the two documents that Adelstein gave him at this session; that he believed that the successorship issue arose at this session; that Respondent's Exhibit 1, which are his notes of some of the negotiations, indicate that there was a meeting on October 19, 2000, where the Company gave the Union proposals to review and Burgos is not included in the list of those in attendance; that there was a meeting on October 20, 2000, where the successorship situation was discussed and it was indicated that the Union would send the successorship language to the Company from its international; that at the October 20, 2000 session he stated that he saw no point in proceeding without the successorship language because the whole process could be moot; and that it is possible that he told Adelstein that he would have the successorship language within a week.

Respondent's Exhibit 32 is a copy of the notes Adelstein took on October 19, 2000. He testified that there were two sessions in October 2000, namely October 19 and 20; and that during the October 19, 2000 session he gave Balash his draft of the agreed upon noneconomic provisions (R. Exh. 30), and his draft of the noneconomic provisions which had not been agreed to yet (R. Exh. 31). On cross-examination, Adelstein testified that Burgos was not present for the October 19, 2000 meeting.

Burgos testified that he was unable to attend the October 19, 2000 meeting but he did attend the October 20, 2000 negotiating session. According to the testimony of Burgos, this was the meeting where Balash (1) alleged that there was an attempt to sell the Respondent to one of its competitors, and (2) demanded that, although the parties had agreed on successorship language, they agree to new successorship language which would be drawn up in about 1 week. Adelstein testified that Balash broke off this meeting indicating that he would have successorship language drafted and he would submit it to Adelstein the following Tuesday. Respondent's Exhibit 33 is a copy of the notes Adelsteri took at this session. On cross-examination, Adelstein testified that Balash also complained at this meeting that the Respondent was hiring employees at higher rates than current employees were being paid.

On November 14, 2000, Balash sent the Respondent the aforementioned successor language (GC Exh. 21).

About November 25, 2000, Balash telephoned Adelstein who indicated that he had not reviewed the successor language with his client yet. Adelstein told Balash that he would get back to him.

By letter dated November 28, 2000 (GC Exh. 30), Armero made the following request of Grana:

> The Union is requesting a list of all Employees including addresses and telephone numbers, for reason of contacting them.

Before Thanksgiving 2000, Armero told Balash that the employees of the Respondent had told him that the Respondent was hiring a number of workers. Balash told Armero to send a letter to the Respondent requesting the names, addresses, classifications, and any pertinent information regarding the new hires. Balash believed that the Union received the information it requested by late November or early December 2000. On cross-examination, Balash testified that the Union insisted on successorship language because it was concerned that the Company was hiring a number of new employees; that the number of employees specified by the Company was not disproportionate with the number of employees that the Union had organized in December 1999; but that nonetheless the Union was still adamant about securing appropriate successorship language.

By fax dated December 1, 2000 (GC Exh. 31), Grana supplied Armero with the employee names and telephone numbers. Armero telephoned Grana and left a message that he needed the employees' addresses. Grana wrote back indicating that she

would need a couple of days to get the information from corporate.

Burgos testified that Balash sent the new successorship language the first week in December 2000.

By fax dated December 6, 2000 (GC Exh. 32), Grana supplied Armero with the names and addresses of the employees (along with those for the managers), indicating which employees were terminated. Grana testified that Respondent's corporate office in Chicago, Illinois sent the list to her; that she placed "T" for termination next to certain of the entries; that she did not know why there was a line drawn through Antoine, Betty since she was employed as of the date of the printout; and that she noted on the printout who was in management. On cross-examination, Grana testified that Antoine is in the bargaining unit and was on the eligibility list for the election in December 1999.

According to the testimony of Balash, in early December 2000 Adelstein contacted him, indicated that he needed more time to review the successor language, and a January 31, 2001 negotiation session was scheduled. Adelstein testified that Amero telephoned him and asked if they could schedule a meeting in January 2001; and that the scheduled meeting was postponed.

By memo from Grana dated "1/11/01" (R. Exh. 10), Luis Hurtado was advised as follows:

> As an hourly employee you are *required* to clock in and clock out in a daily basis. If you are having problems with your FFG ID please see me, so we can fix it.
>
> But I can not be inputting your time in and out everyday. The 'adjustment log' should be only used by management to approve overtime and due to certain circumstances . . . [when] the employee can not punch. [Emphasis in original.]

On about January 28, 2001, Balash asked to meet with Respondent on the night of January 30, 2001.

On January 30, 2001, at 8 p.m. Balash met with Adelstein and Burgos at the Marriott hotel restaurant near the airport in Miami because, according to Balash's testimony, the Respondent's employees were growing impatient about the fact that they were not getting any response on the wage proposal, and he wanted to see if they could facilitate the discussion on the economic issues. According to his testimony, Balash told Adelstein and Burgos that they needed to start talking about wages, and Burgos said that the company was in a very bad financial situation at that time. Balash testified that Burgos then left to use the rest room and Adelstein told him that he was hearing the Union did not have strong support, and he asked Balash why didn't the Union "just walk away from it." (Tr. 137.) When Burgos returned to the meeting, he also said that "they're hearing from workers that the union's losing its support" (Tr. 137). Balash told them that the majority of the people are for the Union. Balash was then asked to take a look at the Respondent's financial records. He told them that he would have to get back to them on that. According to his testimony, Balash told Adelstein and Burgos that the Union was looking to receive a wage proposal from the Company and Burgos said that the Respondent was not in a position to give any type of wage proposal that the Union would accept. On cross-examination, Balash testified that Adelstein may have said that any company "proposal would be a wage freeze or perhaps concessions and that's why they were reluctant to put something on the table."[9] (Tr. 192.) Burgos testified that at this meeting. Balash conceded that the successorship language was not necessary; and that he told Balash that the Respondent was a very sick puppy, the Union's wage proposals were not sound, and Balash was raising the expectations of the committee. Adelstein testified that at this meeting Balash withdrew his successorship proposal; that Burgos told Balash that people were becoming very unhappy with the Union; and that when Balash asked him what he should do, he told Balash that he could lower the expectations of the employees or he could disclaim interest and walk away. On cross-examination, Adelstein testified that Bergos told Balash that there were rumblings that employees at the facility were becoming disenchanted with the Union and Balash should lower the expectations of the employees or he was going to lose the unit; that Burgos told Balash that employees were disaffected; and that when he suggested to Balash that he disclaim interest and walk away, Balash said that he did not intend to do that, and he told Balash that he did not think Balash would. On rebuttal Balash testified that there was no discussion of the successorship language at this meeting.

On January 31, 2001, at 10 a.m. Balash, Armero, and the employee bargaining committee met at the at the Marriott Hotel in Miami with Adelstein, Burgos, and Grana. When the Union tried to discuss wages, Burgos, according to the testimony of Balash, said that the Company was hemorrhaging, it was a bleeding cow, they were very far apart in their proposals, and what the Company had to offer would not be acceptable considering what the Union had on the table. When Balash mentioned that the Union had a problem with the fact that the Respondent had not included checkoff language in its proposed contract, Adelstein indicated that the Respondent wanted some type of disclaimer language incorporated into the checkoff language. Balash testified that the Union caucused and agreed to modify their wage proposal down to $.75 per hour over the 3 years of the contract; and that Burgos said that the Company would have to take a look at the numbers and get back to the Union on it. The Union indicated that it wanted the company fringe benefit package in existence at that time to be incorporated into the collective-bargaining agreement. Balash was told that this would have to be packaged all together because it is economics. On cross-examination, Balash testified that at the outset the parties summarized what had been accomplished and what remained open to discuss; that he said that he wanted to get a contract in the next couple months; that the parties were close to completing the noneconomic issues; that the bargaining committee renewed its May 2000 wage proposal, which is summarized in General Counsel's Exhibit 18; that Burgos said that the Respondent would have to close its doors if it agreed to the Union's wage proposal, it was not financially feasible, it is hemorrhaging, it is a bleeding cow; that at one of the meetings

[9] While this testimony was given when Balash was testifying about the January 30 and 31, 2001 meetings, it is not clear that he was ruling out the fact that these words may have been uttered at some other time.

the Company passed around a spread sheet for the first quarter of 2001 and Burgos explained it, and he was not sure if it was done at this session or at the next session; that as part of the aforementioned presentation, Burgos said that there was a deficit of almost $100,000 in the first quarter of 2001; that after Burgos made his presentation, the Union caucused and came back with a proposal of an increase of $.75 an hour but he was not sure if the Union also proposed to shorten the term of the contract to 2 years; that Burgos probably said that even with the revision of the wage proposal the Company could not afford the proposal; that Burgos again made the financials available to the Union; that it is possible that he told the Company at this session that he would have the union auditors call Adelstein to set up an appointment; that Respondent's Exhibit 2 are his notes of this session; that, as indicated in his notes, the Union withdrew the successorship language which it had previously proposed, Burgos made a presentation to the committee which indicated that the current economic condition at the plant is bad, the Union proposed to cut the term of the contract to 2 years, and he was supposed to call Thomas Havey about auditing the Company's financial records; that at the end of this session he stated that the Union was going to move quickly ahead with the audit, Havey would contact Adelstein to schedule an audit time so that they could set up another meeting; and that another session was not scheduled at this time because the Union was going to wait for the outcome of the audit. Armero testified that he believed that at this session the parties achieved agreement on all of the noneconomic issues, the Union then raised the issue of economics, and the Company did not make a counterproposal even after the Union reduced its proposal from $2 to 75 cents. Armero also testified that at this session Balash asked for a list showing the wages of all bargaining unit employees, including new hires. Adolfo Morales, an employee of the Respondent who was on the Union's bargaining committee, testified that the Respondent indicated that it was not able at the time "to give a salary increase according to the proposal . . . [that] the Union has submitted" (Tr. 331). Burgos testified that he used a flip chart to explain to the employees how much money the Respondent was losing at the time; that at this time the parties had agreed to about 95 percent of the language for the noneconomic proposals; that after the Union caucused, it came back with a wage proposal; that he told Balash that it was very irresponsible of him, after the Respondent's financial presentation, to change just 1 year; that he told the Union it could audit the Respondent's books and Balash accepted the offer; and that he told Balash that the Company could not afford the increase the Union was proposing. On cross-examination, Burgos testified that as of January 31, 2001, 90 to 95 percent of the noneconomic issues were agreed to; that the information he discussed with the bargaining committee was the Respondent's operating statement for the year 2000; that subsequently the Union deleted the last year from its original economic proposal so that the proposal was for 2 and not 3 years; that the offer to the Union to review the Company's books was for the Company nationwide; and that he made the same offer to audit the Company's books to the Union representing the employees at the Respondent's JFK facility in New York, New York, during negotiations which occurred at the same time as the negotiations involved herein.[10] On rebuttal, Balash testified that he believed that the successorship language was touched on at this meeting.

According to the notes Adelstein took at this session (R. Exh. 34), Wilsher attended the January 31, 2001 bargaining session. She was acting general manager of the Respondent's Miami facility between November 2000 and February 2001. Adelstein testified that he believed that there was still a noneconomic issue open at the end of the January 31, 2001 meeting, namely some seniority language having to do with skill and ability; that the Union dropped from $2 an hour to 75 cents an hour for the first and second year of a 2-year contract and the Union wanted the Company to reduce the copay 25 percent a year over 2 years; and that at 1:45 p.m. someone from the Union identified only as George joined the negotiations and said, "[W]hy not give us a realistic counter, why waste more time" (Tr. 1390), and Balash said the he would have Havey contact Adelstein in Chicago to audit the Respondent's books.

By letter dated February 1, 2001 (GC Exh. 33), Armero asked Grana for "[a] list of employees that include names, address[es], phone numbers, wages and hire dates, for all employees including ***NEW HIRES***." (Emphasis in original.) Armero testified that the information was sought by the Union to determine whether to modify its wage proposal even lower than what it had originally.

By letter dated February 13, 2001 (GC Exh. 22), Balash advised Adelstein as follows:

> In May of 2000 the Union submitted both an economic and non-economic proposal to the company.
>
> The economic proposal consisted of wage increases and a reduction in health care co payments; we also stated that all other benefits such as sick days, vacation and holidays remain the same, however the union has not received any economic proposal from the company.
>
> As you already know the Union has modified its economic proposal in an effort to reach an agreement.
>
> The Union respectfully requests that the company submit an economic proposal to the Union within the next several days. I will then review the proposal with the committee and follow up with the company immediately.
>
> Thank you for your attention on this matter.

On cross-examination, Balash testified that between the end of the January 31, 2001 bargaining session and this letter he did not advise the Respondent that the Union was not interested in auditing the financial records of the Respondent.

According to his testimony on or about February 15, 2001, the Respondent's truckdriver Jesus Treto, along with 8 to 10 other of Respondent's employees, was shown two videos by Angel Sanchez, and Grana, and Mazier was present. The first video shown dealt with training and the second video shown to employees dealt with a union. Treto testified that Sanchez told the employees present that the Union was no good for them since the Union was only interested in strikes and the Union

[10] At the time of the hearing herein the Respondent had a collective-bargaining agreement with the Union representing its employees at the JFK facility in New York.

was not interested in benefits for employees. Treto also testified that the lady who is the president and owner of the Company appeared on the video and she said that the Company had the opportunity to grow, and she and Sanchez, in person, said that without the Union the employees would have more benefits, without the Union the Company could continue forward, and the only thing the Union would do would be to take money out of the employees' pockets. Treto further testified that Sanchez and Grana said the Union would obstruct the progress of contracts for new business. On cross-examination, Treto testified that his partner Julio "Nogueva" was at this meeting[11]; that he did not think that Burgos was on the video with Gin[12]; that Sanchez said that the Union obstructs or stops the incoming business that they could obtain with new companies, and Grana said this also; and that Grana said that the Union would prevent the Company from getting new business. Treto further testified that when he previously worked for Sky Chef he was required to be a member of the Union.

By fax dated February 16, 2001 (GC Exh. 34), Grana supplied Armero with the wages but she indicated that she was not sending the telephone numbers and addresses because she had sent them to him a couple of weeks earlier.

By letter dated February 20, 2001 (GC Exh. 23), one of the Respondent's attorneys, Amy Zdravecky, advised Balash as follows:

> I received your letter yesterday requesting the Company's response to the Union's economic proposal. As we explained to you during our last negotiations on January 31, 2001, the Company simply cannot afford the wages and benefits proposed by the Union in its last economic proposal. For that reason, we offered the Union the opportunity to have its accountants (are also located in Chicago) review the Company's finances to prove that we could not afford your proposal. At the time, you accepted our offer and advised us that we would be contacted directly by your auditors to arrange for the review. To date, we have not been contacted.
>
> Please let us know if we can assist you in arranging a mutually convenient time for your auditors to review the Company's financial records. We promise to assist you in any way we can in accomplishing this task. We feel that once the Union has had a chance to review the Company's financial records, you will have a much better understanding of the Company's financial position and we hope to be able to reach a reasonable agreement on the economic terms of the contract.
>
> Please contact me for assistance in arranging a review of the Company's financial records or if you have any questions regarding this matter.

Adelstein testified that he and Zdravecky discussed this response to Balash's above-described February 13, 2001 letter.

Hector Enrique Fernandez Rodriguez worked for the Respondent from February 21, 2001, until March 1, 2002.[13] He testified that a few days after he was hired, he and other named drivers were shown a training video and a video about unions by Supervisor Angel Sanchez; and that:

> The video was a dramatization of the people that belong to the union of when you try to do the work and then delivering some messages that the union is not good for the worker that it doesn't resolve the workers' problems, that it only survives because of the work of the worker. In summary that it cannot deliver and that the owner is the only one that can resolve the problems of the employees. [Tr. pp. 391 and 392.]

Rodriguez further testified that after the video Sanchez told the employees that he formerly was in a union, that union did not provide many benefits, it just got him into problems, and it was a very negative experience in his life; and that after seeing the video about unions, he and another named driver approached Sanchez and told him that

> we had signed with the union and we didn't know what the union was about but then after seeing the video we had realized that we had gotten into a big problem and that, you know, we wanted to get out. [Tr. pp. 394 and 395.]

Hector Rodriguez testified that some days later Mazier approached him and another named employee and asked them, while they were working, to sign a document to indicate that they did not want the Union in the working place. He did not read the paper but relied on what Mazier told him was on the paper. Both he and the other employee signed the paper.[14]

According to the testimony of Burgos, on February 28, 2001, Air France gave the Respondent 30 days notice that the Respondent's bid had been accepted, which meant that service was to start on March 28, 2001.

Grana testified that in late February and early March 2001 the Respondent started hiring employees to service the Air France and Northwest accounts, and eventually it added approximately 60 employees to its work force of about 100 employees.

According to the testimony of Burgos, about the first week in March 2001, Northwest Airline accepted the Respondent's bid and service was scheduled to begin the first week of April 2001.

[11] He was asked if it was "Noguera" and he replied that he thought it is "Nogueva." When subsequently testifying about a later showing of a video about a union, he answered, "correct" when asked, "[w]as Mr. Noguera in that meeting with you." It is noted that GC Exh. 55, which is a list of active and terminated employees for the first 8 months of 2001, contains an entry for Julio Noguera but it does not contain an entry for Julio Nogueva.

[12] Burgos does appear on a video with Gin, a transcript of which was received as R. Exh. 36.

[13] According to his testimony, he was unjustly terminated when he had emergency surgery and belatedly supplied the documentation to the Respondent showing that he had an operation because he had to wait to get the documentation from the surgeon. He gave an affidavit to the Board on March 13, 2002.

[14] It is noted that there is an entry for "Hector E. Fernandez" on L. 1 of R. Exh. 38(f). The entry is dated "4–12–01."

By letter dated March 1, 2001 (GC Exh. 24), Balash advised Zdravecky, as here pertinent, as follows:

> After careful consideration HERE, Local 355 does not see any reason to review the company's financial situation in Miami.
>
> The Union has no reason to doubt the company's economic situation. However we believe that [the] company is obligated to make a counter offer to our proposal.
>
> When we receive your proposal we will then meet with the workers and take [a] vote whether to accept the economic offer or not.
>
> If you have any questions or concerns please contact my office at . . . .
>
> . . . .

On cross-examination, Balash testified that this was the first time since the January 31, 2001 bargaining session that the Union advised the Respondent that the Union did not desire to audit the Respondent's financial records; and that after he sent this letter, the March 28, 2001 bargaining session was scheduled through Adelstein. On redirect, Balash testified that the Union choose not to audit the Respondent because the Union's international research department looked at the Company as a whole, not just Miami, and the Company was a $100 million company, it had revenues in excess of $100 million, and it continued to grow. Adelstein testified that this was the first time he learned that the Union was not interested in auditing the financial records of the Respondent; and that the parties scheduled the next negotiating session.

General Counsel's Exhibits 49(a) through (j) are staffing requisitions which specify "Air France & Northwest" as the justification for the new positions. Two of the forms indicate that the position was posted "3/01/01." And one of the forms indicates that position number 20, viz, lead dishwasher, was posted "3/23/01." Otherwise the posted date is not specified in the box on the form. Grana testified that she prepared all of the postings and posted them for all of the above-described staffing requisitions.

The former general manager at the Respondent's Miami facility, Victor Vidal, testified that there was a contract between Air France and the Respondent; that there was an actual contract between the Respondent and Northwest Airline; that the Respondent started the catering of Air France flights in late February; that in the first 2 months of service to Air France, and up to the time he left the Respondent in September 2001, there was no reason for him to think that Air France might cancel the contract; that he did not remember the date the Northwest contract was signed but he recalled that service started 4 days after service to Air France started[15]; and that there was no reason for him to fear that the Northwest contract would be lost while he was general manager of the Respondent from February 2001 to September 2001. On redirect, Vidal testified that the Respondent was months into providing service to Air France before it determined whether the start up met the projections and it was the same with Northwest; that just because the Respondent had projections that it was going to make a certain amount of money, it did not mean that the Respondent would actually make that money from either Air France or Northwest; that Air France reached about 70 percent of the projection and Northwest reached about 50 percent of the projection; that when he first came to the Respondent it was losing between $3000 and $4000 a week in Miami; that while management expected the financial situation to improve at the Miami facility with the Air France and Northwest accounts, when the Respondent started servicing Air France and Northwest things did not improve financially but rather it got worse; and that 1 month after service began the Respondent got the actual numbers on the Air France and Northwest accounts and realized how far off the projections were.

General Counsel's Exhibits 50(a) through (j) are the postings for specified positions in administration, production, transportation, sanitation, and storeroom. All of the positions were first posted on either March 1 or 2, 2001, except for lead dishwashers which was first posted on March 23, 2001, and the dispatch clerk in transportation which was first posted on April 23, 2001. Grana testified that the Respondent did not hire any persons to fill the jobs covered in these postings prior to March 1, 2001.

Noguera was hired as a truck driver by the Respondent in the first week of March 2001. He had previously worked for the Respondent for 2 years and voted in the December 17, 1999 Board election. During his first week after he was hired by the Respondent in March 2001, he was shown two videos in a conference room at the Respondent's facility with about 10 other employees. Angel Sanchez and Grana were present. Noguera testified that one of the videos was about the work and there was also a 35-minute video about someone who had lost their job and the Union did not do anything about it "and they never resolved any salary issue to the employees." (Tr. 244.) On redirect, Noguera testified that when Grana was talking about the union video it was indicated "[t]hat the union didn't resolve anything, that they didn't increase salary, that they didn't do anything." (Tr. 261.) On re-cross, Noguera testified that Grana did not say anything except to look closely at the video and to make their own conclusions, and the whole video was negative about the Union.

According to the testimony of Noguera, about 1 week after he was shown the video about a union, a blond lady who worked with Grana approached him with a list with various signatures and asked him to sign a paper to decertify the Union. Noguera, who at the time was preparing a flight, told the woman that he was busy and maybe later. Noguera testified that he was then called to the cafeteria by Mazier who spoke to him about the Union; that Mazier told him to speak to Jesus and to other people to decertify the Union; that he told Jesus that each employee should make up their own mind; and that he did not sign the decertification petition. On redirect, Noguera testified that he had never spoken with the woman from the personnel department before she asked him to sign the decertification petition; and that when she asked him to sign the decertification petition she told him that Mazier had gotten him the job and

[15] When counsel for the General Counsel indicated that she had subpoenaed the Northwest agreement and it was not produced, one of the attorneys for the Respondent stated that it does not exist.

Mazier was his friend. According to Noguera's testimony, the woman works in the same office as Grana.

Respondent's Exhibit 3 is a leaflet to the employees of the Respondent about a strike, work stoppage, or other work action vote to be held on March 21, 2001. As here pertinent it indicates as follows:

> On Wednesday March 21, 2001 there will be a voting at the Local Union to decide on *Work Stoppage, Strike or other Work Action.* This will take place if *WE DO NOT* reach an agreement on the negotiation set for March 28, 2001.

On cross-examination, Balash testified that Adelstein telephoned him and said, "[W]hat the 'f' are you doing? . . . you're painting yourself into a corner." (Tr. 210.) Adelstein told Balash about the incoming work from the Air France and Northwest Air accounts and how important it was to avoid a work stoppage at all costs because of the need for a successful start up of those operations. Balash honored Adelstein's request.

According to the testimony of Balash, on March 28, 2001, at the Intercontinental Hotel in Miami, before the negotiating session, Burgos and Adelstein told him that they were not prepared to give the Union a reasonable wage offer at the time and what they had would not be acceptable to the Union; that the Respondent was acquiring two new accounts and after startup the Respondent would be able to give the Union a wage proposal which the Respondent thought would be acceptable; and that they would have a clearer picture of what their financial situation was by May 3, 2001. According to his testimony, Balash told Adelstein and Burgos that the employees were really getting anxious, they were frustrated, they had not received a wage increase in a long time, and he would take the Respondent's position back to the committee and talk to them about it. Balash met with the committee before the bargaining session began, and he told them what the company representatives had just told him in the "off the record" meeting. Balash testified that the committee members were very angry and frustrated and wanted to organize to walk off the job. Balash told the committee members that this would not be advisable since the Respondent had just hired a number of new employees and had almost doubled the size of its staff since the Board election. The bargaining session began at 11 a.m. and it lasted about 2.5 hours. Present were Balash, Armero, and the bargaining committee for the Union, and Adelstein and Burgos for the Company. Grana came to the session after it started. According to Balash's testimony on direct, the Company passed out a financial spread sheet showing its quarterly returns and earnings, Burgos went over the spread sheet and tried to explain it. Burgos also indicated that with the new accounts, the financial picture should change. When the company representatives, later in this session, asked that the spread sheets be returned, the union representatives gave them back. Balash testified that during negotiations the Company did indicate that it had something to offer in terms of a wage proposal but when he asked the company representatives to show it, Adelstein said, "[Y]ou're not going to like it." (Tr. 149.) Balash testified that he demanded to see the proposal and Adelstein said, "[I]t doesn't make sense for us to show you anything because you're just not going to like it" (Tr. 149); that Adelstein said the Union would not accept it and he told Adelstein that the Company should let the Union be the judge of that; that Adelstein said "no" (Tr. 150); and that he then said, "[O]kay, well we'll just have to wait until May 3rd." (Tr. 149.) The parties agreed to meet again on May 3, 2001. Balash testified that Burgos said that "hopefully they would get back to . . . [the Union] with a reasonable economic offer." (Tr. 150.) On cross-examination, Balash testified that during his off-the-record discussion with Adelstein and Burgos he was told about the importance of the startup of the Air France and Northwest accounts, the Respondent did not want any disruptions at the worksite, and maybe he was told it was in the best interests of the Company and the employees; that during the off-the-record discussion with Adelstein and Burgos, he told them that he was not pleased with the May 3, 2001 date that they were proposing, he really felt that it was time that they provide the Union with a wage proposal, but to have a positive labor management relationship he took them at their word and he said okay; that he told the bargaining committee between the off-the-record discussion and the bargaining session that the Company was going to suggest waiting until May 3, 2001, to make a wage proposal; and that during the bargaining session the Company explained to the bargaining committee why it wanted to wait until May 3, 2001, to make the wage proposal. Union bargaining committee member Morales testified that his affidavit to the Board is correct where it indicates that at this meeting the Respondent brought up the new contracts which would get them more money and asked if they could give the Company's money proposal at the next session which was scheduled for May 3, 2001. Morales also testified that the Union was willing to wait until May 3, 2001, for the Company's wage proposal.

Burgos testified that he and Adelstein met with Balash out of the presence of the union bargaining committee before the negotiating session began; that he told Balash that the passing out of strike leaflets was very detrimental to the employees of the Company; that he told Balash that the Respondent could come up with an economic proposal at this session but the Union would not be happy with it and if the Union gave the Company 30 days to see how the Air France and Northwest start up went, he could come back with a more realistic proposal; that it would take 30 days to determine if the Respondent's projections regarding these two new accounts were accurate; that he proposed May 3, 2001, to reconvene; and that Balash agreed to wait until May 3, 2001, for an economic proposal but he wanted Burgos to sell it to the union committee. Further Burgos testified that when the full committee convened he explained the situation to them and told them that if they gave him until May 3, 2001, he would come back with an economic proposal that he thought would be acceptable to them; that he was not asked to make an economic proposal to them that day; and that one of the union committee members, identified only as "Jean," objected to adjourning and waiting until May 3, 2001, for the Company's economic proposal. On cross-examination, Burgos testified that he told the bargaining committee that if they wanted an economic proposal he was willing to give them a proposal at that time but they would not be very happy with it in that it would be based on the economic situation at that time;

and that he told the employees that the Miami operation had been sold four times.

Adelstein testified that he and Burgos told Balash before the negotiating session that (a) business was very poor but the Respondent was about to land two new accounts which could improve the Respondent's financial situation to the point where the Respondent could make an attractive offer that employees may accept, and (b) if the Respondent were forced to make an offer at that time, the offer would be very slim and unlikely to be ratified; that Balash agreed that it would be better to wait until the Air France and Northwest accounts were up and running when the Respondent would be in a position to give perhaps a better offer depending on the performance of the two new accounts; that they explained to Balash that if the Respondent had to make an economic proposal at that time based on its current numbers, it would be a decrease in wages or benefits, or maybe a freeze in wages; that Respondent's Exhibit 35 is a copy of the notes he took at the negotiation session held later that day; and that during the negotiating session Burgos explained the financial situation and, in answer to a question regarding how long the Respondent was going to be losing money, Burgos indicated that if it kept losing money it would have to sell the business in Miami, which had already been sold four times. On cross-examination, Adelstein testified that the Respondent did not have a prepared wage proposal to present at that time but it had an idea of what could be offered, namely a wage cut or freeze; that they discussed the possibility of a wage cut or freeze with Balash during the private meeting with him before the negotiating session but, pursuant to an agreement with Balash, they did not tell the committee of this possibility during the subsequent negotiating session[16]; and that the Respondent had not considered a retroactive wage proposal prior to one of the bargaining committee members asking about a retroactive raise. On redirect, Adelstein testified that during the meeting with Balash preceding the March negotiation session, he did not at any time tell Balash the Respondent would not make a wage proposal.

On rebuttal Balash testified that during the March 28, 2001 meeting he alone had with Adelstein and Burgos before the bargaining session he was not told that the Company's wage proposal, if given at that time, would be a wage freeze, a wage cut, or a wage reduction; that when he asked Adelstein and Burgos if they were prepared to discuss wages that day, Adelstein told him that what they had the Union would not accept and would not like it; and that the Respondent did not provide any specifics with respect to what the wage proposal would constitute—no documentation or written proposal was handed to him.

According to the testimony of Balash, on the night of March 28, 2001, the Respondent met with Air France. On cross-examination, Balash testified that the Union received a call that evening from the bargaining committee indicating that at the meeting with Air France Burgos told the people from Air France that the Union was out, the Union was not here anymore; that while bargaining unit members were not at the meeting, they were in the area and could hear what was going on; that Burgos and the Air France people had a champagne toast and some cake in the cafeteria; that he telephoned Burgos at the plant but Burgos denied what the bargaining committee had told the Union claiming that the Company was looking to bargain and the Company was not trying to pull any fast moves; that the Union had heard that the Respondent had shown the new hires an antiunion video; and that he did not believe that on March 28, 2001, the bargaining committee members told him anything about a decertification petition circulating among the employees, and he thought that occurred subsequently.

Burgos testified that some of the representatives of Air France and the Respondent did celebrate the start up of service and he did make a champagne toast but he never mentioned the Union, and during his meeting with Air France he did not make any comments about the status of negotiations with the Union; and that a couple of days later Balash telephoned him and told him that he was hearing rumors that the employees were very unhappy with what had transpired on March 28, 2001.

On March 29, 2001, the Union filed a charge with the Board alleging that the Respondent violated Section 8(a)(5) of the Act by failing to bargain in good faith. This charge was withdrawn on April 12, 2001. Balash testified that when the charge was filed the Union believed that the Respondent was trying to have the Union decertified, the Respondent was showing an antiunion video to employees during orientation, management did not provide the Union with a wage offer, and the Union wanted to block the attempted decertification. Balash further testified that because the employees on the bargaining committee said that nothing was going on at the time, and since the Respondent was providing information and Balash did not want to hinder the parties from reaching a settlement on May 3, 2001, the Union withdrew the charge. General Counsel's Exhibits 25(a) through (d). On cross-examination, Balash testified that the charge was based on the Company's refusal to make a wage proposal; that in his May 4, 2001 affidavit to the Board, he indicated that the March 29, 2001 charge was filed because the Union was concerned about the employer circulating a decertification petition since more than a year had passed since certification; that he did not have any evidence of this when this charge was filed; that the March 29, 2001 charge does not refer to the Company circulating a decertification petition; that the fact that the Union had not received a wage proposal up to that point and the certification date was up on March 29, 2001, the charge was filed in order to give the Union time to figure out what was going on; that it was his understanding that having a charge already on file would block the processing of a decertification petition; that the charge was withdrawn when he found out that nothing was being circulated at the time; and that to the best of his recollection, the Respondent did not condition the holding of a meeting on May 3, 2001, upon the withdrawing of the March29, 2001 charge.

At the end of March 2001, according to the testimony of Noguera, Vidal approached him and about four other employees when they were outside in the yard getting in trucks to go load planes, and Vidal told them that the Union had been decertified. Noguera testified that Vidal asked the employees if they had been notified about it and they told him that they did not know

[16] At one point in his testimony Adelstein testified that this occurred on January 30 but he later corrected this testimony.

anything about it: and that this occurred when the employees were leaving the Respondent's facility to load a plane. On redirect, Noguera testified that when Vidal made the statement about the Union being decertified, he was preparing a load for Jamaica Airline and Falcon Airline.

One of the attorneys for the Respondent elicited the following testimony from Vidal:

> Q. How are you familiar with Flying Foods?
>
> A. I was employed at Flying Foods from February 16th through the end of September 2001 as general manager.
>
> . . . .
>
> Q. Now when you began working at Flying Foods in the first month of our employment, during the period of February and March, did you have any meetings with the employees in which you discussed the union?
>
> A. No.
>
> Q. Did you ever discuss the union with any employee individually in the first month of your employment?
>
> A. No.
>
> Q. Did you ever advise any employees during that time period that the union had been decertified?
>
> A. No, ma'am. [Tr. 892–894.]

Subsequently, Vidal testified that he knew Noguera and he never told him, or any other employee in March 2001, that the Union had been decertified; and that prior to the meetings he and Grana held together with employees in the office or in the conference room to tell them that the Company no longer recognized the Union, he never informed any employees, either in a meeting or individually that the Union had been decertified.

Armero testified that at the end of March 2001 committee members told him that a decertification petition was being circulated among new hires by Mazier. Armero testified that the Union called a committee meeting on April 3, 2001, and began to circulate its own petition. On cross-examination, Armero testified that the committee members always reported to him that there was a decertification petition since the end of March 2001, and he did not change the report of this fact to Balash; and that he did not instruct the committee that they should wait before they started collecting signatures on the petition. On redirect, Armero testified that after the October 18 or 19, 2000 negotiation session he asked the bargaining committee to continue picking up union authorization cards to make sure that the Union still had support, and this continued until the end of March 2001. Based on the cards and the February 16, 2001 list of employees the Respondent sent the Union (GC Exh. 34), Armero testified that he concluded that at the end of March 2001 the Union was supported by a majority of the Respondent's employees who were in the bargaining unit.

Solano testified that he attended a meeting with the Company as a member of the Union's negotiating committee in March 2001 where salary was discussed. After the meeting, while at work, Wilsher asked him why, after helping the Company, he was now against the Company and he was helping the Union. Solano testified that Wilsher said in the presence of other dishwashers that if the Company fired him, he would see if the Union would help him find another job; and that Wilshire was very upset and she said in a strong tone of voice that he was an ungrateful person. Wilsher testified that Grana told her that Solano attended a bargaining session and she could not believe this because during the organizing campaign Solano told her that he supported the Company and was totally against union representation; that she had a conversation with Solano in the hallway between the dish room and the receiving area for the store room; that there were people working in the dish room; that she told Solano during this conversation that she had learned that he was at the bargaining session and she asked him what happened; that Solano said that there were some things that the Company had done and that was why he attended the bargaining session for the Union; that when she asked him what happened she was asking him why he had a change of heart; that she did not ask him anything else; that she did not ask him what support he thought he could gain from the Union; that she did not raise her voice to Solano but it is noisy in that area because of the dishwashing machine; and that she did not have any other conversations with Solano in 2001 regarding the Union.

In March and April 2001, a number of employees were hired by the Respondent to work on the Air France and Northwest accounts. Two personnel action forms were used to document these hires. One, General Counsel's Exhibit 43(a), has a category heading "UNION" with boxes in front of "UNION" and "NONUNION." None of these boxes were checked on the forms documenting the involved hires.[17] The other form (GC Exh. 44(a), does not have these boxes.

Burgos testified that before beginning service to Air France and Northwest the annual revenues for the Respondent's Miami facility were around $6 million; that the Respondent projected that the annual revenues from Air France would be $2.9 million, and the annual revenues from Northwest Airlines would be about $1.9 million; that he approved the hiring of about (a) 40 employees so that the Respondent could service the Air France account, and (b) 30 employees for the Northwest Airlines account; that one of the Respondent's competitors, Sky Chef, previously serviced the Northwest Airlines account; and that Gate Gourmet previously serviced the Air France account.

According to his testimony, about the beginning of April 2001 Treto was again shown the above-described video regarding a union. He testified that this time there were more employees present; and that Sanchez and Grana were present, and Mazier told the employees that about 4 or 5 years earlier a union had unsuccessfully attempted to organize the Company, the employees lived without the Union and they did not need it then. On cross-examination, Treto testified that there were about 12 employees present at this meeting; that Sanchez and Grana were present at this meeting and that is all; that both Mazier and Sanchez told the employees that a union had unsuccessfully tried to organize the employees about 5 years earlier, the employees lived without the Union, and the employees did

[17] See GC Exh. 45(a). Many of the personnel action forms received as GC Exhs. 45(a) through (nnnnnnn) cover new hires in March and April 2001. Some, however, cover hiring outside this period and some cover actions other than hiring which occurred either in or outside these 2 months.

not need a union; that on the video the owner of the Company, Sue Gin, made statements against the Union; and that the video with Sue Gin was the only video that he saw on the union.

Sanchez, according to his testimony, conducted two training sessions for the new drivers hired for the Northwest Airline account in April 2001.[18] He testified that he was directed to conduct the training by the transportation and operations managers; that Grana gave him a video about a union and told him to show it during his training session; that he showed the video at one of the training sessions; that when he showed the union video to the employees there was no other manager or supervisor present; that he showed about eight videos during the training sessions and they included a "Welcome to the Company" video and videos dealing with hygiene, airport security, how to approach an airplane, and how to do the job in the field; that the union video was the last video he showed during the training session; that he could not recall if he made any statements about the union video; that some of the drivers asked why the union video was not shown when they were first hired; that employee Hector Fernandez (Rodriguez) said that if he had seen the video before, he would not have signed a union authorization card; that Fernandez asked him what to do and he told Fernandez to speak to another employee; that he told the employees that he was the president of a local when he worked in New York City; that the video was about signing a union authorization card but he could not recall what was said on the video; that he never told drivers during these sessions or any of Respondent's Miami employees in 2001 that the Company would lose business opportunities due to support for the Union; and that he did not tell the employees that the Company would withhold wage increases due to employee support for the Union in either of the training sessions he conducted in 2001 or to any employee in 2001. On cross-examination, Sanchez testified that he showed the union video only on one occasion, and Grana was neither present when he showed it nor was she present at any time in the training session on the day he showed the union video; that he believed that he told the employees that in New York he went from shop steward to president of Local 2750 of the Machinists (IAM); and that he did not believe that it was a possibility that the Company would lose business opportunities if the employees supported the Union. On re-cross, Sanchez testified that one of the training sessions for the Northwest and Air France startups was held on April 11, 2001, and he believed that the other training session for these startups was held about 5 to 7 days before April 11, 2001.

Grana testified that she participated in two nontransportation department orientation sessions conducted for new employees in March/April 2001; that there were one or two other driver and coordinator sessions, which were conducted by Sanchez, which she did not participate in; that one of her sessions was in Spanish and the other one was in English; and that she showed five videos to the employees, namely the "Welcome to Flying Foods" video, a video on knife safety, one on regulations referring to the handling of food, one on diseases which can be transmitted to food, and "Little Card, Big Trouble." Transcripts of "Welcome to Flying Foods" and "Little Card, Big Trouble" were received in evidence as Respondent's Exhibits 36 and 37, respectively, by stipulation. The latter was the English version. The distributor of the Spanish version, which was the version shown to the employees, did not comply with the subpoena duces tecum of counsel for the General Counsel with respect to the Spanish version. Grana further testified that before she showed the videos to the new employees she told them only that she was going to put certain videos on for them to "listen to" (Tr. 1502); that she translated the "Welcome to Flying Foods" video and the videos on knife safety, diseases, and proper handling of food, which are in English only, for the Spanish session in which she participated; that she did not communicate to the employees in Spanish anything more than what was being said on the video in English; that she reviewed the "Little Card, Big Trouble" video a couple of days before she showed it to the new employees; that she received the "Little Card, Big Trouble" video, which is in Spanish, from Heston after she requested something that she could show the employees about what a union was; that before showing the new employees "Little Card, Big Trouble" she told them that "[s]ince . . . [the Respondent was] negotiating with the union, I just thought that I [would] introduce this video to them, so that they have a knowledge of, of their choices" (Tr. 1508); and that she did not make any comments while "Little Card, Big Trouble" was being shown in either of the orientation sessions she participated in, nor did she tell the new employees that (a) they would receive a wage increase if they got rid of the Union; (b) they could lose their jobs or be fired if they supported the Union; or (c) the Company would lose business opportunities if they supported the union. On cross-examination, Grana testified that she believed that she conducted the first orientation session for new hires on March 18, 2001, and one or two others in March; that she did not think that she conducted group orientation sessions in February or April 2001; that she translated the video "Little Card, Big Trouble," which was in Spanish, for the employee orientation meeting held in English; that Heston only sent her a Spanish version of "Little Card, Big Trouble"; that while she believed that the new employees should see the video about Unions so they would have knowledge of their choices, she told the employees that the Respondent was in contract negotiations with the Union and that is why she wanted to show them the video about Unions; that the choice that she wanted them to know about was not whether or not the employees wanted to have the Union but rather whether they wanted to sign the card or not; that the card which she was referring to was "[t]he card to participate in the union or not to participate. . . . I guess they should know that they have the . . . choice to sign the card that they agree with the Union or not to agree with having a union . . . ." (Tr. 1641); that the card that she was referring to is the card that is described on the video, namely a card, the purpose of which is whether the employees want to join a union or not join a union; that she gave the "Little Card, Big Trouble" video to Sanchez to show to new employees a couple of days after her orientation sessions; and that she did not appear, even momentarily, at the orientation sessions that Sanchez conducted.

[18] After September 11, 2001, Sanchez became the maintenance manager.

With respect to the videotape shown to new employees in 2001 during orientation at Respondent's involved Miami facility, Heston testified that the tape dealt with employees' rights as they pertain to a union; that she purchased the tape and she viewed the tape in its entirety; that the tape was purchased from a company named Projections; that Projections requested that the tape be returned to it and she complied with the request; that no reason was given for the request, which was both verbal and in writing; that Projections gave the Respondent another tape to replace the tape which was returned; that she never viewed the replacement tape; that she believed that the tape was shown at the other facilities of the Respondent; that the owner of the Respondent, Sue Gin, appears in another videotape which is shown during orientation but she did not believe that it was shown to employees in 2001 during their orientation; that she did not think that Gin addressed unionization issues in her video; and that she believed that the tape was sent back to Projections in 2001.

Burgos testified that he had no knowledge about when the video was requested back from the Respondent by Projections; that the Respondent's senior leadership group, which is an executive committee which meets weekly and monthly, decided to show the original video from Projections because the Respondent hired employees from Gate Gourmet and Sky Chef, both of which operate under the Railway Act under which the employees have no choice regarding whether they would join or not join the union; that the Respondent wanted to make sure that the former employees of Gate Gourmet and Sky Chef understood that they had a choice when they came to work for the Respondent, which is not subject to the Railway Act, because Florida was a right to work state; and that some of the employees who viewed the video were not former employees of Gate Gourmet or Sky Chef.

In mid-April 2001, Solano was washing dishes when Mazier told him that "they were collecting signatures to organize a group of people to negotiate with the Company because the Union was not capable of obtaining all what the employees needed." (Tr. 380.) Solano told Mazier that he could not sign the document because he had been at a meeting where the employees received a commitment for May 3, 2001, from Burgos that the Company would reach some sort of an agreement on that date. Mazier told Solano that if they collected the signatures they needed, there would not be a May 3 meeting.

Also in mid-April 2001, according to the testimony of Treto, Mazier approached him and other employees on the loading dock, in his working area, and asked him to sign a document indicating that the employees did not want the Union to represent them. Treto refused to sign the document. He testified that when he saw Mazier approaching employees in the various departments with the papers he held, he did not see any supervisors present; that from the office of Nelson Nunez, who is operations manager at the Respondent's Miami facility, one could see the preparation department and a section of the kitchen where they prepare food; and that Mazier was in the preparation and kitchen department. Subsequently Treto testified that he saw Nunez in his office on one occasion when Mazier was in the preparation and kitchen departments with papers; that this was the day he saw Mazier taking papers to other departments after showing the papers to him; and that there would be no need for employees in the preparation or in the kitchen departments to be filling out applications for identification to go to the airport.

In April 2001, according to the testimony of Luis Hurtado, who is a coordinator at the Respondent's Miami facility, Mazier spoke with employees in the salad room telling the new employees that "if they would sign for no union, he was going to give them a better salary increase, better salaries, better benefits, opportunities, . . . [than] employees that were there working longer for the company." (Tr. 469.) Hurtado also testified that Mazier was carrying a file and some of the employees signed; that when the employees signed they were working in the production area; and that the production area is the same as the food preparation area. On cross-examination, Hurtado testified that the papers Mazier had the employees sign were completely blank. In his July 12, 2001 affidavit to the Board (GC Exh. 36, p. 3, LL. 11–13), Hurtado indicated, "He [Mazier] was telling them that if they signed the paper for no Union they would have better salary, benefits and opportunities than the employees who had been working for the Company longer."

Nunez had his office on the main floor right in front of the production area in April 2001. He testified that he had a small window in his door through which he could see some of the production area while he is seated at his desk; and that he had a window in the wall of his office but he could only see the production area through it if he rose about 4 inches from his chair. Nunez spends a couple of hours in his office each workday and the remainder of the time he is in the kitchen making sure that everything is getting ready.

Respondent's employee Demaris Fernandez, who was called by the Respondent to rebut certain of the testimony of employee Hurtado, testified on cross-examination by counsel for the General Counsel—over the objection of Respondent's attorney, Zdravecky,—that no one approached her about the Union in April 2001; that no one approached her with a piece of paper to sign regarding the Union; that she never signed a piece of paper; that she did not recall anyone approaching her in 2001 about the Union and asking her to sign anything; and that she did not remember signing a piece of paper with lines on it. What purports to be her signature appears on what was introduced at the trial herein as a petition for decertification (R. Exh. 38(a), L. 16).

Vidal testified that he never saw the petition for decertification, he did not know who signed it, and he did not know who circulated it. On cross-examination, Vidal testified that Grana did not show him the petition; that she did not tell him how many employees were on the petition; that he could not recall if Grana told him who gave her the petition; and that he knew that Grana told him who gave her the petition for decertification but when he testified at the trial herein he just could not remember who gave it to Grana.

Burgos testified that on April 17, 2001, he received a telephone call from Grana who told him that she had received a petition from the employees; and that he told her to contact Zdravecky and follow her instructions. On cross-examination, Burgos testified that when Grana telephoned him on April 17, 2001, "[s]he said an employee came in, gave her a petition,"

(Tr. 1290); that he told Grana to telephone Zdravecky and to follow her strict instructions. Burgos gave the following testimony:

> JUDGE WEST: With respect to Ms. Grana's call on the 17th of April, Year 2001, regarding the petition, is that the first that you were aware of such a petition?
>
> THE WITNESS [Burgos]: Yes. I was out on the West Coast.
>
> . . . .
>
> **RE-CROSS-EXAMINATION**
>
> Q. BY MS. PLASS: Did Ms. Grana call you on April 17 when you were on the West Coast, out on the West Coast?
>
> A. Yes.

Grana testified that on around April 18, 2001, she came into her office in the morning (she estimated at 8 or 8:30 a.m.) and she found an envelope under her door which, as here pertinent, contained pages of signatures with printing at the top of some of the pages (R. Exhs. 38(a) through (1); that before she found this document under her door she had never seen the document before; that she "immediately" (Tr. 1516) called Burgos and told him what the document said on top, namely "[w]e employees of Flying Food Group no longer wish to be represented by Local 355 H.E.R.E., AFL–CIO, Union," and that the document had signatures and dates and the departments; that she did not say anything else to Burgos who told her to talk to Zdravecky, one of the Respondent's lawyers; and that she telephoned Zdravecky and told her what she had told Burgos and nothing more. Grana then gave the following testimony on direct:

> Q. BY MR. SECARAS: What did you do after speaking with Ms. Zdravecky?
>
> A. Okay. I verified the signatures on the document.
>
> Q. Tell us what you did to verify the signatures?
>
> A. I went through the employees' files and looked up documents that showed their signatures.
>
> Q. Did you look for any one document in particular?
>
> A. I looked at the W-4 form or which other document I found, if they didn't have a W-4.
>
> Q. What did you do after comparing the documents in the employee personnel files with signatures to those signatures on the document you received?
>
> . . . .
>
> Q. BY MR. SECARAS: What, if anything, did you do?
>
> A. I looked through each one and I wrote on the side, duplicates, because there were some duplicates. And I wrote the word term next to employees that were terminated. [Tr. 1518.]

Grana wrote "Admin" next to line 10 on Respondent's Exhibit 38(d) which purports to be the signature of Liz Bell Boada, who is a payroll clerk and not in the bargaining unit. She testified that the entries on lines one through eight on Respondent's Exhibit 38(i) were already covered with what appears to be liquid paper when she received the document[19]; and that she changed line numbers 42 through 50 on Respondent's Exhibit 38(b) because they were not in sequence. Grana then gave the following testimony on direct:

> Q. What, if anything, did you do upon completing your review of the document you received against the employee personnel files?
>
> A. I'm sorry, what was that again?
>
> Q. What, if anything, did you do after you completed your review of the document you received versus the documents from the employee personnel files that your looked at?
>
> A. The document was put in a safe place.
>
> Q. The document that you're looking at?
>
> A. Yes.
>
> Q. Did you do anything else with respect to the document?
>
> A. No.
>
> Q. Did you communicate the results of the analysis you did to anyone?
>
> A. Yes, I did.
>
> Q. To whom did you communicate those results?
>
> . . . .
>
> A. Zdravecky.
>
> Q. Okay. When did you make that communication with Ms. Zdravecky?
>
> A. A couple of days after I had received the document.
>
> Q. Did you make that communication on the same day that you did your analysis?
>
> A. Yes. [Tr. 1522 and 1523.]

Further, Grana testified that Respondent's Exhibit 39 is the fax cover sheet that she sent to Zdravecky with those pages of Respondent's Exhibit 38 which had signatures on them, namely Respondent's Exhibits 38(a), (b), (c), (d), (e), and (f); that the cover sheet is dated "4/18/01" and this is the date on which she transmitted the fax to Zdravecky; that April 18, 2001, was either the same day or the day after she received the employee petition but she could not remember exactly; and that in the comments section of the fax cover sheet she wrote the following:

> 177 on payroll Register
> -17 of/admin & Mgmt.
> -14 terms showing active
>
> ___
> 146
> 1-Admin
> 3-Duplicates
> 2-terms
>
> __
> 6 that are on the list that do not count

Grana testified that she used the payroll register which had a total of 177 employees; that she deducted from the 177 employees 17 who were administrative and management employees and 14 employees who were terminated; that the payroll registers cover 2 week periods and the one she used at that time covered the most recent 2-week period prior to April 18, 2001; that the petition contained the signatures of one administrative person who was not in the bargaining unit, the signatures of

[19] There are no other handwritten entries on this page or on R. Exhs. 38(g), (h), (j), (k), and (l).

three people who signed twice, and the signatures of two people who were terminated and should not have been in the petition; that at the time she thought her calculation was accurate; that when she received the first payroll register after April 18, 2001, she learned that her calculation was not accurate; that she advised Zdravecky that her original calculation was not accurate; that she neither performed a subsequent calculation for Zdravecky nor did she provide Zdravecky with a copy of the payroll register she received after April 18, 2001; and that she believed that Wilsher provided a copy of the later payroll register to Zdravecky.[20]

On cross-examination, Grana testified that when she found the petition under her door her door was closed and locked; that employees have access to the area just outside her office to use a copier and a fax machine; that managers, supervisors,[21] and certain employees have mailboxes in the area just outside her office; that Dario Mazier has a mailbox in the area just outside her office because a lot of paperwork is put in his box for the drivers and from the drivers; that the envelope was inside her office; that she arrived at work that day about 8 or 8:30 a.m., which is her usual time; that she guessed the envelope was left by an employee but she did not see anybody put it in her office[22]; that she did not witness anyone signing or placing their marks or writing anything on Respondent's Exhibits 38(a) through (f); that after she spoke with Burgos and Zdravecky, she personally went to the employment files of the employees on the list and she personally pulled the files; that she verified that the people on the list were all employed by the Respondent; that she has no personal knowledge of whether the individuals whose markings appear on Respondent's Exhibits 38(a) through (f) read the language that appears on the top of Respondent's Exhibit 38(a) [and also it appears at the top of Respondent's Exhibits 38(d), (e), and (f) but not at the top of Respondent's Exhibits 38(b) and (c)] before they placed their name or other markings on Respondent's Exhibits 38(a) through (f); that she did not witness what the employees were told about what was printed on the top of certain of the pages; that while the pages were attached when she received them she did not know if they were attached when the signatures or markings were placed on the pages; that she began to review the files at about 10 or 11 a.m. the same day she received the petition; that this was after her telephone conversation with Zdravecky, who asked her to do it immediately; that the purpose of reviewing the employee files was to verify the signatures and the employment status of the people who were on the petition; that while she included Jorge Gonzales (R. Exh. 38(b) at L. 40), in her count of valid signatures, according to a Respondent's personnel action form (PAF) (GC Exh. 57), this individual resigned effective April 9, 2001[23]; that she signed General Counsel's Exhibit 57, her signature is not dated, she did not recall when she signed it, the manager, Rafael Rosario, dated his signature "4/09/00" (sic), she filled out the PAF, and the PAF would have been filled out before Rosario signed and dated it; that Annais Salicio, whose name appears on line 2 of Respondent's Exhibit 38(e), and Maria Aguilar, whose name appears on line 10 of Respondent's Exhibit 38(f), were counted in the number of employees who signed the petition because although, as memorialized in General Counsel's Exhibits 58 and 59, respectively, both were discharged effective on April 13, 2001,[24] she, Grana, did not fill out the discharge forms until after she received the petition; that while she counted Jerry Garnley, whose name appears on renumbered line 46 of Respondent's Exhibit 38(b), his name is not on General Counsel's Exhibit 55, which is—as here pertinent—a list of active employees at the Respondent's Miami facility in April 2001[25]; that there would be a PAF for the hiring of an employee and she had specific recall of a PAF for Garnley[26]; that she counted the entry for Angel Hernandez, whose name appears on line 5 of Respondent's Exhibit 38(f), and his name does not appear on the list of active employees, described above, because he worked in the administrative department for a while and then transferred to the storeroom; that she did not recall when Hernandez transferred; that Hernandez was either a supply clerk or a storeroom clerk and there would be a PAF indicating the

[20] The payroll register, with a "Report Date" of "05/04/01" was received as R. Exh. 16. Grana testified that when she sent the fax to Zdravecky on April 18, 2001, she was not relying on R. Exh. 16, which indicates that it covers pay period "09." R. Exh. 12 indicates that pay period 9 is a 2-week period in 2001 beginning on "4/13" and ending on "4/26."

[21] Ivan Vasquez, Bernie Toledo, Alvaro Caicedo, and Jose Laureano.

[22] Grana then gave the following testimony:

> JUDGE WEST: For the record, you arrived that morning at 8:00 of 8:30. How long was it before you called Mr. Burgos?
>
> THE WITNESS [Grana]: About an hour and a half or so because they're in Chicago. [Tr. 1650.]

[23] The "REMARKS" portion of the form reads as follows:

> Came in at 10:30 AM was sent in to get some equipment never came back. When called home wife said that he is out. NO CALL, NO SHOW

This raises an interesting question in that if Gonzalez (spelled with an "s" instead of a "z" on the disaffection petition) "never came back" after April 9, 2001, how could he have signed the petition as an employee on "04–12–01" as is indicated on L. 40 of R. Exh. 38(b). A similar question could be asked about another signature on L. 39 of R.Exh. 38(b). If Eduardo Perez (also spelled with an "s" instead of a "z" on the disaffection petition) was, as is indicated on GC Exh.t 55, terminated ("Voluntary - Dissstisf") on April 9, 2001, how could he also have signed the petition on April 12, 2001? As will be seen infra, there are questions about how others could have signed the petition on April 12, 2001, when, according to Grana, it appears that they were not in Miami at that time.

[24] Grana testified that she believed that these two employees told the Respondent that they had something of an emergency and had to go to Tampa or Orlando but that they would come back; that after a couple of days they did not come back; that she issued them the termination PAF showing an effective date of April 13, 2001, because it was the day they left; and that Aguilar's PAF indicates "No call, no show." At one point when asked if she pulled Salicio's personnel file the day she received the petition, Grana testified, "I would imagine so." (Tr. 1662.)

[25] The Respondent did not refute the assertion of counsel for the General Counsel that while she subpoenaed "[t]he disaffection petition and any other documentation relied upon as a basis for Respondent's withdrawal of recognition of the Union" (par. 15 of p. 2 of the attachment to GC Exh. 41), the Respondent did not give counsel for the General Counsel any documents for Garnley in response to this paragraph of the subpoena.

[26] Such a PAF was never produced by the Respondent.

transfer as well as his employment[27]; that she took into consideration the fact that the involved unit description excludes "storeroom clerks"; that the department listed after Hernandez' name on Respondent's Exhibit 38(f) is storeroom; that she counted the entry on line 22 on Respondent's Exhibit 38(a) for Ivan Vasquez since she believed his promotion to shift supervisor occurred after he signed the petition because he wrote coordinator next to his name and he was a coordinator before he became a supervisor; that while there would be a PAF for Vasquez' promotion she did not check it; that she counted the entries for Alvaro Caicedo, who is a shift supervisor, Bernie Toledo, who is a supervisor, Vincent Massari, who was a purchasing supervisor in April 2001 and who was a member of the bargaining unit as storeroom hourly supervisor; that Toledo, Caicedo, and Vasquez are authorized to make entries in the sick and adjustment log; that Juan Carlos Abud, whose name appears on renumbered line 43 of Respondent's Exhibit 38(b), and Maximo Rodriguez, whose name apparently appears on line 19 of Respondent's Exhibit 38(f), are supervisors; that Domingo Robaina, whose name appears on line 24 of Respondent's Exhibit 38(a), was fired effective April 20, 2001 (GC Exh. 60); that Samuel Miranda, whose name appears on line 21 on Respondent's Exhibit 38(a) was terminated effective April 20, 2001 (GC Exh. 61); that she used the W-4 received as General Counsel's Exhibit 62(a) to verify the employment or the signature of Karina Prida, whose name appears on line 8 of Respondent's Exhibit 38(d); that she did not look at the W-4 received as General Counsel's Exhibit 62(a) to verify the signature on the petition since that document was dated "5-25-01"[28] ; that she did not know if General Counsel's Exhibit 62(b) was the exact document that she used to verify the signature of Patricia Caquimbo, line 4 of Respondent's Exhibit 38(d)[29]; that she verified the information on the petition pertaining to Guillermo Dausa, whose name appears on line 8 of Respondent's Exhibit 38(e), by viewing a document in his personnel file[30]; that after she read the subpoena, she had a payroll clerk pull the subpoenaed documents from the personnel files that had employee signatures but she did not know that it had to be the same documents she used to verify the signatures[31]; that she could have used General Counsel's Exhibit 62(d) to confirm the information on the petition regarding Celemine Luis, lines 10 and 11 on Respondent's Exhibit 38(e), but she did not remember exactly[32]; that General Counsel's Exhibit 62(e) could be the document she relied on for verifying the information that was on the petition for Norma Naranjo on Respondent's Exhibit 38(e), line 5[33]; that she was not sure if General Counsel's Exhibit 62(f) is the document that she used for the purpose of verifying the information on the petition, Respondent's Exhibit 38(f), line 1, regarding Hector Fernandez in April 2001[34]; that she was pretty sure that she did not rely on General Counsel's Exhibit 62(g) in verifying the information for Lumise Jean Gilles on the April 2001 petition, Respondent's Exhibit 38(f), line 12, because it is dated June 4, 2001[35]; that she did not rely on General Counsel's Exhibit 62(h) to verify the information for Emile Julmiste on the April 2001 petition, Respondent's Exhibit 38(b) renumbered line 48, because the document, a W-4, is a 2002 form[36]; that she did not specifically recall verifying the signature of Domingo Robaina and she did not recall an instance where she had to utilize the driver's license of an employee; that with respect to Maria Aleman [R. Exh. 38(a), L. 5], Yreida Perez [R. Exh. 38(d), L. 14], and Raphael Dausa [R. Exh. 38(e), L. 6], there was no document in those given to counsel for the General Counsel pursuant to her above-described subpoena with the representation that these were the documents that the Respondent relied on to verify the information of these employees on the April 2001 petititon; that she did not ask Boada in administration, who asked her to sign the petition and why she signed it if she was not in the bargaining unit; that she checked off "Urgent" on the fax cover sheet (R. Exh. 39), because Zdravecky wanted to know immediately after Grana had gotten the results and Zdravecky told her this when she telephoned Zdravecky to tell her that she had received the petition; and that after she sent the analysis (R. Exh. 39), to

[27] The Respondent did not refute the assertion of the General Counsel that she did not receive a PAF for Hernandez pursuant to her above-described subpoena.

[28] The Respondent did not refute the assertion of counsel for the General Counsel that this was the document she received pursuant to her subpoena requesting the documents the Respondent relied on in connection with the petition.

[29] The W-4 is dated "4–26–01."

[30] The Respondent did not refute counsel for the General Counsel's assertion that the document she received pursuant to par. 15 of her above-described subpoena is dated "5–2–01," GC Exh. 62(c).

[31] As noted above, the language in the subpoena reads "[t]he disaffection petition and any documentation relied upon as a basis for Respondent's withdrawal of recognition of the Union." Obviously Grana could not have relied upon documents which were not yet in existence when she did her analysis.

[32] The document is a responsibility counseling form purportedly signed by Luis in February 2002. The Respondent did not refute the statement of counsel for the General Counsel that this was a document that was produced by the Respondent pursuant to the above-described subpoena with the representation that the Respondent did rely on it for the purposes of verifying the information of Luis on the petition.

[33] The document is a medical benefit plan rnrollment/change form apparently initialed by Naranjo and dated "6/27/01." The Respondent did not refute the statement of counsel for the General Counsel that this document was produced pursuant to the above-described subpoena as information that was relied upon by the Respondent in connection with the petition in April 2001.

[34] The document is a medical benefit plan enrollment/change form apparently signed by Fernandez and dated "6/29/01." The Respondent did not refute the statement of counsel for the General Counsel that this document was produced pursuant to the above-described subpoena as information that was relied upon by the Respondent in verifying the information of Fernandez on the petition that the Respondent received in April 2001.

[35] The Respondent did not refute the statement of counsel for the General Counsel that this document was produced pursuant to the above-described subpoena as information that was relied upon by the Respondent in verifying the information of Jean Gilles on the petition that the Respondent received in April 2001.

[36] The Respondent did not refute the statement of counsel for the General Counsel that this document was produced pursuant to the above-described subpoena as information that was relied upon by the Respondent in verifying the information of Julmiste on the petition that the Respondent received in April 2001.

Zdravecky she "had no other conversation with her regarding the information that . . . [she] sent to . . . [Zdravecky]" (Tr. 1702). On redirect, Grana testified that Salicio and Aguilar were supposed to come back on April 13, 2001, but she did not recall whether they were out on April 12 or 13, 2001; that she decided to terminate these two individuals when the manager told her that they had not called in a couple of days; that Toledo was a transportation supervisor in April 2001 and was in the bargaining unit as transportation hourly supervisor; that in April 2001 Massari was the storeroom hourly supervisor, which is a bargaining unit position; and that, in her opinion, the signatures or markings on General Counsel's Exhibits 62(a) through (h) are similar to or identical to those for the involved individuals on the petition.[37] On re-cross, Grana testified that there are no markings on line 27 of page 1 of the April 2001 petition (R. Exh. 38(a)), which would lead her to believe that these are the marks of Tania Martinez judging from what is on the W-4 that was furnished pursuant to the above-described subpoena (GC Exh. 67(a)); that the purported signature of Anne Henry on line 19 of the first page of the petition (R. Exh. 38(a)), seems different than the signature on the W-4 that was turned over pursuant to the above-described subpoena (GC Exh. 67(b))[38]; that the signature purportedly of Yurima Varela on line 31 of Respondent's Exhibit 38(b) is the same as the signature on the W-4 supplied pursuant to the subpoena (GC Exh. 67(c)); that the purported signature of Samuel Miranda on line 21 of Respondent's Exhibit 38(a) is not the same as the signature on the document supplied pursuant to the subpoena (GC Exh. 67(d))[39]; that what purports to be the signature of Norma Calero on line 2 of Respondent's Exhibit 38(a) looks different than the signature on the W-4 supplied pursuant to the subpoena (GC Exh. 67(e)), but she was not sure if Calero really signed the W-4; that what purports to be the signature of Romona Loyola on line 8 of Respondent's Exhibit 38(a) is the same as the signature on the W-4 supplied pursuant to the subpoena (GC Exh. 67(f)); that none of the markings on the W-4 (GC Exh. 67(g)), supplied pursuant to the subpoena match the purported signature of Israel Aguila on line 18 of Respondent's Exhibit 38(a) because Aguila did not sign the W-4[40]; and that the signature supplied pursuant to the subpoena (GC Exh. 67(h)), does not exactly match the markings on line 40 of the petition (R. Exh. 38(b)), for Jorge Gonzalez.[41] Subsequently Grana testified that she had no experience whatsoever in comparing signatures in a legal matter; that it took her "like around almost a week, I believe" (Tr. 1770) to compare the signatures and markings on the petition for decertification against known samples of the signatures of the employees; that she had not completed her review of the signatures when she faxed her analysis to Zdravecky on April 18, 2001, "I just completed the numbers for her. The actual looking up each individual signatures I could not do in that time frame" (Tr. 1771); that she had not verified the signatures when she faxed the information to Zdravecky on April 18, 2001[42]; that subsequently when she did verify the signatures there was no documentation whatsoever from her to Zdravecky on this point; that the formation of some of the letters on line 12 of Respondent's Exhibit 38(f) is different that the letters on the W-4 supplied pursuant to the subpoena (GC Exh. 62(g)), and the spelling of the last name on the petition (Giles) is not the same as on the W-4 (Gilles); and that it could be assumed that Aguilar and Salicio, since they were terminated for not returning to work on April 13, 2001, were not working on April 12, 2001, yet both of their signatures on the petition are dated April 12, 2001.

On rebuttal Earnesto del Toro, one of the Respondent's truckdrivers, testified that while he was working on April 11, 2001, Toledo asked him to sign a piece of paper which had one other signature already on it; that there was nothing on the piece of paper, it was blank except for the one signature; that there were no other papers attached to the sheet that Toledo gave him to sign; that Toledo told him "[t]hat the union . . . was not in the Company any longer" (Tr. 1831); that Toledo, as here pertinent, said that the paper was to get a $2 raise for the drivers; that his signature appears on the second line, which is numbered 29, of Respondent's Exhibit 38(b); that Toledo did not tell him on April 11, 2001, that the paper he was asked to sign meant that he no longer wished to be represented by the Union; that he wanted the Union to represent the employees of the Respondent; and that he received a raise of 50 cents (an hour) 2 weeks after the next pay. On cross-examination, del Toro testified that before his above-described conversation with Toledo, Burgos had come to Miami and told the employees that the Union had left the Company and there would be a pay raise; that he was not told the amount of the raise that he would receive at the meeting where Burgos spoke; that Toledo approached him with the piece of paper 1 day after the meeting when he was told there was going to be a raise; that he did not remember if the meeting at which Burgos spoke was on April 10, 2001; that he did not say it was 1 day after, rather it was days after when Toledo approached him with this raise of $2; that the Company did not hold another meeting after he signed the paper for Toledo; that a second meeting was held where the six drivers present were told that if they were working for 1 year they would get a $1 raise but since he did not have 1 year

[37] As noted above, it does not appear that the documents introduced by counsel for the General Counsel as GC Exh. 62 were even in existence on or around April 18, 2001.

[38] In two places on the W-4, namely the signature line and the line where the first name is printed, the first name is spelled Anne and not Ann as on the petition.

[39] As noted above, this individual was discharged on April 20, 2001.

[40] Actually it appears that he placed his initials on the W-4 on the line designated employee's signature and the same or similar initials do not appear on the petition.

[41] The last name on the petition is spelled Gonzales and not Gonzalez as it is spelled on the application for employment. Additionally, as noted above, he resigned effective April 9, 2001, and what purports to be his signature is dated "04–12–01."

[42] Grana testified that she received all of the pages of the petition at the same time. Since some of the entries appear to be dated April 17, 2001 [LL. 11 and 12 of R. Exh. 38(e)], and since Grana testified that she received the petition around 8 or 8:30 a.m., it appears that the earliest she could have received the petition would have been April 18, 2001, unless the two individuals who signed and dated the entries on April 17, 2001, worked and signed the petition before Grana came to work, and whoever dropped the petition off did so after these two people signed and before Grana arrived at work on April 17, 2001.

with the Company he received a raise of 50 cents; that Burgos was not present at the second meeting; that he telephoned Armero "some days" after April 11, 2001, and told him what Toledo said about the Union leaving and drivers were going to get a $2 increase; and that he provided an affidavit to the Board on the morning that he testified at the trial herein, June 13, 2002.

By letter dated April 18, 2001 (GC Exh. 26), Zdravecky advised Balash as follows:

> We have received objective evidence that a majority of the Flying Food Miami employees no longer wish to be represented by the H.E.R.E., Local 355. Therefore, Flying Foods is hereby withdrawing recognition of your Union as the collective bargaining representative for their Miami employees.

Armero testified that he received this letter on April 18 or 19, 2001, and he did not present any of the information that he had gathered with respect to the Union's majority status to Zdravecky or any other company representative but he did tell Balash about the information he had regarding the Union's majority status. On re-cross, Armero testified that Balash's inquiry regarding majority support was prior to April 18, 2001, and Balash did not ask for confirmation after April 18, 2001.

Burgos testified that he was involved in the decision to withdraw recognition from the Union on April 18, 2001; that he met with Adelstein, they discussed the procedure, the law, and then determined that the Respondent would withdraw recognition; that it was his decision to withdraw recognition from the Union; and that subsequently he advised Vidal and Grana to hold meetings with the employees and explain a notice prepared by the Respondent's attorney, which was posted in three languages and which is described below.

Adelstein testified that he had very little involvement with the decision to withdraw recognition from the Union; that he was busy with other things and Zdravecky, who was not present at any bargaining session on behalf of management, was advising the Company at that point; that he has no personal knowledge of who submitted the petition to the Company; that he believed that the person who submitted the petition that was signed by employees to the Company is an employee of the Respondent; and that his involvement in the decision to withdraw recognition from the Union consisted of being informed that a majority of employees had indicated that they no longer wished to be represented by the Union, he was asked whether the opinion given by other members of his firm that the Company withdraw recognition was appropriate, and he responded that it was.

Vidal testified that Manager Grana showed him the April 18, 2001 letter to the Union withdrawing recognition. On cross-examination, Vidal testified that Grana showed him the letter on or about April 18, 2001; and that Grana showed him the April 18, 2001 letter sometime after she told him about the petition for decertification.

Grana testified that a couple of days after April 18, 2001, a copy of Zdravecky's April 18, 2001 letter was sent to the Respondent's Miami facility and the general manager, Vidal, showed it to her; that between the time she forwarded the fax to Zdravecky on April 18, 2001, and when she saw a copy of Zdravecky's April 18, 2001 letter she did not discuss the petition with any nonmanagement employees at Flying Foods; and that after she read Zdravecky's April 18, 2001 letter she did not individually have any communication with the Respondent's Miami employees regarding the Company's withdrawal of recognition from the Union. On cross-examination, Grana testified that she first learned of the decision to withdraw recognition when Vidal told her about it and showed her Zdravecky's April 18, 2001 letter a couple of days after she sent Zdravecky the April 18, 2001 fax.

By letter mistakenly dated April 17, 2001 (GC Exh. 27), the Union's attorney, Kathleen Phillips, advised Zdravecky as follows:

> This firm represents HERE Local 355. Your letter dated this date has been referred to me for response. It is the Union's strong belief that the company has engaged and continues to engage in unfair labor practices, including today's withdrawal of recognition of the union. Enclosed please find the unfair labor practice charge being filed this date. Notwithstanding the foregoing, the Union herewith demands bargaining over terms and conditions and most particularly demands an economic proposal, which to this date, has not been forthcoming from the company. Please contact this office with . . . [a] time, date and place for negotiations and please forward to my attention the company's economic proposal.

It was stipulated that this letter was misdated and it was actually sent on April 18, 2001.

By letter dated April 19, 2001 (GC Exh. 28), Zdravecky advised Phillips as follows:

> We received your letter dated April 17, 2001. On behalf of Flying Food, we deny that it has engaged in any unfair labor practices as alleged in your charge. Given our lawful withdrawal of recognition that we sent to the Union yesterday, Flying Food has no intention of engaging in any bargaining with the Union at this time. Moreover, as we are sure you recognize, under the circumstances, such bargaining would be unlawful.
>
> We trust that this letter adequately responds to the matters you raised in your April 17 letter.

Balash testified that immediately after receiving the April 19, 2001 letter from the Respondent he instructed Business Agent Armero to tell the bargaining committee what was going on and to get a petition to show the Union did have support.

Vidal testified that in the third week of April 2001 a notice was posted to employees in the cafeteria and hallways indicating that the Company no longer viewed the Union as the employees' representative. (R. Exh. 13.) Two of the 17 sentences in the body of the notice speak to this. The remainder speaks to the employees' right not to speak to union representatives and union supporters, and not to be harassed. The notice was posted in English, Spanish, and Creole. Vidal also testified that he and Grana met with groups of employees to convey this message, and neither he not Grana met with the employees alone about this notice; that during these meetings he told the employees that the Company no longer recognized the Union as their rep-

resentative because a majority of the employees "had petitioned to do so" (Tr. 904); that neither he nor Grana told the employees that the Union had been decertified; and that he never, either during a meeting with employees or individually, said that the Union had been decertified. On cross-examination, Vidal testified that the main reason for these meetings was to let the employees know that they had the right not to be harassed.

Grana testified that there were two or three employee meetings to communicate verbally to employees regarding the Company's withdrawal of recognition from the Union; that she, Vidal, and Burgos, along with about 20 employees, were present at these meetings; and that she posted a notice (R. Exh. 13), in the cafeteria in English, Spanish, and Creole. On cross-examination, Grana testified that the notices were posted a couple of days after the decision to withdraw recognition.

On rebuttal, the interpreter used to translate certain of the testimony and evidence at the trial herein, Vincent Nova, testified that in the Spanish version of the notice instead of using the word "acosado," which means harass, the Respondent used the word "abusado" which means abuse. The Respondent stipulated to the translation obtained by the General Counsel of the Creole version, and it was received as General Counsel's Exhibit 68.

Vidal testified that the employees received a wage increase after the meetings were held with the employees about the above-described notice, they "were given in May [2001]. It wasn't as a result of . . . the petition being signed or anything. It was because . . . the company was you know our responsibility to give them the increases" (Tr. 905); that he, Burgos, and Grana met with small groups of employees and told them that they were going to receive a wage increase; that Burgos told the employees at these meetings that the Respondent was giving the wage increase because the Company decided on a new wage scale for existing employees and new hires; that the new wage scale was shown to the employees with a flip chart (R. Exhs. 14 and 15); that the raises were not based on whether the employee supported the Union; that Burgos did not tell employees at these meetings that they "were receiving the raises or reward for getting rid of the union" (Tr. 919); that neither he nor Grana told employees during these meetings that they were receiving the raise as a reward for getting rid of the Union; that the union issue was never discussed in these meetings; that in these meetings the employees were told that an arrangement, called EAR, would be established whereby a group of employees who represented other employees would meet with management monthly to discuss open issues and anything management brought to the table; that Grana told the employees that EAR was formed to meet the needs of the employees and to improve the product the Respondent's customer was going to receive; that neither he nor Grana told employees that EAR was formed to replace the Union; and that the Union was not discussed or mentioned with respect to EAR. On cross-examination Vidal testified that before they met with the employees he, Burgos, Grana and Wilsher met for 2 or 3 days to discuss the wage increases; that these management meetings occurred at the end of April before May 4, 2001, but he could not remember the exact date; that Burgos picked May 4, 2001, as the effective date; that the economic condition of the Company in Miami was not one of the reasons for granting the wage increase; that the economic condition in Miami when management was discussing the wage increase was poor, the Company was struggling in Miami; that the purpose of EAR was to give the employees the opportunity to discuss any issue; that at the meetings with the employees the wage increase was discussed first and then EAR was discussed; and that Burgos told the employees at these meetings

> that the employees . . . petitioned not to be represented by the union any more, and as a result then the negotiations, and the wage increases would be done between the employees and the company. [Tr. 954.]

On redirect, Vidal testified that while he testified that Burgos told the employees that a petition had been signed by the majority of the employees not to be represented by the Union and negotiations would be between the employees and the Company, Burgos never said either that the wage increases were being given as a reward for the petition or because the employees had signed a petition to get rid of the Union or because they had removed the Union, they were getting this increase.

Burgos testified that he did not recall telling the employees that there was a petition not to be represented by the Union, and as a result wage increases would be given by the Company; and that he never mentioned the disaffection petition to the employees during the three days of meetings he held with them regarding the wage increases.

Grana testified that she was not involved in the decision-making process regarding the pay increases given to Respondent's Miami employees in May 2001; that she did attend some meetings about a week after May 4, 2001, with Burgos and Wilsher at which the pay increases were discussed; that she was not sure if Vidal was present; that competitors' wages were discussed at the meetings she attended; and that prior to May 4, 2001, the last pay increase given to the Respondent's Miami employees was in June 1999. On cross-examination, Grana testified that she was called into the meeting when there was a question about a specific department position; that she did not remember if Toledo received a raise; that Abud Juan Carlos' PAF indicates that he was not eligible for the raise; and that she did not remember if Alvaro Caicedo, Ivan Vasquez, Vincent Massari, and Maximo Rodriguez were eligible for the raise "[b]ecause they are supervisors so they're in another category as the hourly employees" (Tr. 1710). On redirect, Grana testified that Respondent's Exhibit 46 is the hourly wage structure that the Respondent used from June 1999 to May 3, 2001; and that this wage structure changed in May 2001 in that the Respondent no longer has a 90-day increase (R. Exh. 18).

Grana further testified that about 1 or 2 weeks after May 4, 2001, she, Vidal, and Burgos held two or three employee meetings to inform the employees that they were to be given a pay increase; that Burgos was not present at all of these employee meetings; that she spoke on benefits at these employee meetings; that she prepared documents which were shown to employees at these meetings, i.e. (R. Exh. 15); that she spoke at these employee meetings about EAR which was management meeting with employees on a monthly basis to answer employees' concerns; that she told the employees that they could select

employees in different departments to attend these EAR meetings and the employees could write out their questions and submit them to management; and that she drafted Respondent's Exhibit 40 and presented it at these employee meetings. The poster (R. Exh. 40), reads as follows:

> Employee
> At improving
> Relations
>
> Every 6 months employees will select 6 representatives . . . [who] will meet with management on a monthly basis to discuss company issues.

Grana testified that the poster was only prepared in English; and that she did not tell employees at these employee meetings that the EAR committee was intended to replace the Union. On cross-examination, Grana testified that EAR was the idea of Burgos; that the purpose of the EAR committee was to give employees the opportunity to ask questions about rumors; that management was notified on May 23, 2001, about the implementation of EAR (GC Exh. 63(a)); that nomination forms (GC Exh. 63(b)) were sent to employees but none were returned; that the first meeting occurred about 1 or 2 months after May 23, 2001; that the EAR program was still in existence at the time of the trial herein but the meetings were not being held on a consistent monthly basis; and that the employees are not precluded from bringing up concerns they have regarding terms and conditions of employment, including wages. On redirect, Grana testified that while the employees could ask anything about wages, i.e., when were they going to get a raise, the purpose of the EAR committee was not to negotiate wage increases.

Burgos testified that the Respondent organized or formed employee-led improving relations committees at its facilities in Chicago, Newark, Seattle, Los Angles, and Dallas; that the employees of the Respondent are organized at its facilities at JFK (New York, New York), Midway, and San Francisco; that he was involved in the decision to implement in 2001 the EAR committee in Miami; and that an employee committee had previously existed at the involved Miami facility in 1999 but the group stopped meeting.

According to the testimony of Treto, sometime in May 2001, Grana told all of the drivers who were in the portal of the loading dock that "if the Union is certified, there won't be any raise." (Tr. 424.) Treto testified that Supervisors Rene (Largaespda) and Angel (Sanchez) were present when Grana made this statement. Treto also testified that Sanchez repeated what Grana said. Although Grana testified at the trial herein, she did not specifically deny Treto's testimony.[43] Largaespada did not testify at the trial herein. Sanchez testified that he did not tell any employee in 2001 that the Company would withhold wage increases due to employee support for the Union. Sanchez did not testify Grana did not make this statement to a group of employees including Treto.

In May 2001, the Respondent implemented a wage increase retroactive to May 3, 2001. Balash testified that at no time in 2001 did the Respondent's representatives request to meet with the Union to bargain over the wage increase for the bargaining unit employees, the parties did not bargain about a wage increase for the unit during bargaining sessions, the Respondent did not provide notice to the Union about the wage increase for the bargaining unit before it was implemented, and he found out about the wage increase when employees told Armero who told him sometime in the summer of 2001. Noguera testified that he received a raise of 50 cents in May 2001.

General Counsel's Exhibits 46(a) through (ee) are personnel action forms of the Respondent, all but one with an effective date of "5/4/01," which document an annual salary increase for 2001 to the employees named on the forms. Most of the forms also specify a retroactive amount. General Counsel's Exhibit 45 also contains some personal action forms covering this salary increase. The last annual salary increase with a scale change before this one occurred in 1999 before the Board election. Heston testified that for persons in job classifications when the scale changed, their rate of pay would have changed based on their length of service.

On May 5, 2001, Respondent's employee Luis Hurtado received a responsibility counseling form (verbal warning) for reporting to work at 6 a.m. instead of his scheduled time of 4 a.m. (R. Exh. 9).

On May 6, 2001, according to his testimony, Morales and all of the drivers from the transportation department attended a meeting with Largaespda, who is in charge of sanitation, and Grana. Morales testified that Grana told the employees that they were in the process of decertifying the Union, it no longer existed, and given this condition, there would not be any more negotiations; and that Grana told the employees that the Company had improved financially, they were going to give salary increases, and since there was no intermediary like the Union, the Company was proposing to form a group, EAR, to be represented by an employee of each department to deal with the different issues that would come up either with respect to labor problems, wages, or any other problem. Morales testified that Grana said that since decertification was in progress, the Company needed to form a committee of employees so that they could deal with the internal problems. He also testified that while he did not sign the decertification petition, he did receive a raise. Morales gave an affidavit to the Board (GC Exh. 35) on June 12, 2001. In the last two full sentences of the last paragraph on page 2 of the affidavit he indicated as follows:

> In that meeting they told us that there was no more union in the kitchen because the employees had signed papers to throw out the Union. They told us that for that reason, they had given a raise to all the employees in the kitchen.

On re-cross, Morales testified that one of the reasons that Grana gave that the Company was able to give an increase

[43] At p. 32 of its brief, the Respondent, citing p. 1508 of the transcript, argues that "Grana unequivocally denies telling any employee in May or at other time that wage increase would be withheld if the Union was certified." The only testimony on p. 1508 of the transcript with respect to wages reads as follows:

> Q. During the orientation sessions you conducted, did you ever tell the employees in those sessions that they would receive a wage increase from the company if they got rid of the union?
>
> A. No.

when it had not before was that the Company had more business and had made more money; and that Grana said that they were able to give an increase because the union issue was over.

Burgos testified that he returned to Respondent's Miami facility on May 7, 2001, and met with Vidal, Grana, and Wilsher to discuss a wage increase that the Respondent was going to give to its employees; that the Respondent was having a turnover problem because its wages were so low in that it had not adjusted them since June 1999[44]; that the pay of the transportation employees was severely under market, there was a huge turnover, their training was substantial, and the Respondent wanted to focus on that group more than the others; that increases to management, administration, and supervisors were not included in these discussions; that the Respondent compressed its pay scale to entry, 6 months, and 12 months (deleting a raise after 90 days), and it adjusted most of its rates to be competitive; that flip charts (R. Exhs. 18, 19, and 20) were used in the meetings with employees to explain the wage increases[45]; that he told Grana and Wilsher that he made a commitment to the employees that the Respondent would have a wage increase on May 3, 2001, and he wanted to have one implemented on that day; that the pay increase was effective May 4, 2001, which was the start of a pay period; that he participated with Vidal and Grana in all of the meetings with employees on May 9, 10, and 11, 2001, with respect to the wage increase; that he explained the raises to the employees at these meetings and he told them why the increases would be retroactive to May 4, 2001, namely that at the last negotiating session he made a commitment that there would be an increase on May 3, 2001; that he never told the employees that these wage increases were being provided as a reward for getting rid of the Union; and that after these May 2001 meetings with the employees regarding the pay increases, he did not have any conversations with the employees regarding the wage adjustments, other than immediately following the meetings when he referred questions to Vidal and Grana. Subsequently Burgos testified that he did not agree with the testimony of Vidal at the trial herein that the projections of the Respondent were off by 70 percent with Air France and were off by 50 percent with Northwest; that the Respondent had a 3-year written agreement which allowed Air France, if it was not happy with the Respondent's performance, to cancel the agreement apparently with 30 days notice; that since there was no written agreement with Northwest, he guessed that Northwest could pull out whenever they wanted to; and that 2 weeks into providing the service to Air France and Northwest he had an understanding of what to expect from these two accounts.

Wilsher testified that she was on the committee which decided to grant a wage increase; that the committee did not discuss presenting the information about the wage increase to the Union; that while the wage increases were retroactive, she did not know how the date was chosen; that she did not recall when the Company began to discuss the wage increase or when she was asked to participate on the committee, and that seniority and being competitive were factors which were considered for giving the wage increase.

On May 14, 2001, Hurtado attended a meeting at work regarding wages. Burgos, Vidal, and Grana were present along with about 20 other employees. According to Hurtado's testimony, Burgos spoke telling the employees that they were going to receive a raise and that the Union was not capable of obtaining a salary increase.

By position statement dated May 17, 2001, signed by Adelstein, the Respondent asserted that the petition that was signed by the employees was received April 18, 2001. Adelstein testified that while he was the partner in charge of the investigation by the National Labor Relations Board (the Board) in 2001, he did not have much involvement in it at all; that albeit he signed the May 17, 2002 position statement, he did not prepare it but he did read it; and that the position statement indicates that the petition that was signed by employees was received on April 18, 2001.

Balash testified on cross-examination that he thought that in May or June 2001, the Union received a petition which led him to believe that more than 50 percent of the employees at the Respondent's Miami facility supported the Union; that the Company was hiring employees and the Company was not giving the Union information on the new employees, and consequently the Union did not know the total number of employees; that when he found out about the results of the petition he was at a union convention from July 11 to 17, 2001; and that soon after receiving the petition he issued a directive to Armero to notify the Company that the Union had retained majority support of the workers at the Miami facility. On redirect, Balash testified that he believed that he saw the petitions in late June 2001 and he did not recall seeing any petitions in July or August 2001; and that he saw "some stuff" (Tr. 237), apparently referring to "petition stuff" (id.) in June and July 2001. On re-cross, Balash testified that he had a conversation with organizer John Beatty about the petition, Beatty told him that he was going to send a letter to the Company and when he spoke to Armero about the petition, he instructed Armero to send a letter and Armero said that he was going to send a letter out to the Company.

By position statement dated June 20, 2001, signed by Adelstein, the Respondent asserts that there were 146 employees in the bargaining unit as of April 18, 2001. Adelstein testified on cross-examination that he read the statement prior to signing it and in making this assertion he relied on statements given to him by other members of his firm. On redirect Adelstein testified that he did not take any action to confirm the accuracy of the number of 146 bargaining unit employees; and that he did not inquire from anyone in his firm or from the Respondent how the 146 was calculated. On re-cross, Adelstein testified that he believed that Zdravecky prepared this and the May 17, 2002 position statements. On further redirect, Adelstein testified that he did not know for a fact that Zdravecky prepared these two statements.

On June 28, 2001, Hurtado coordinated an American West flight. He testified that he did not put the involved flight together; that Supervisor Bernie Toledo put the flight together

[44] Burgos testified that "[p]rior to this, Miami had an annual increase every June." (Tr. 1295.)

[45] The drivers were shown R. Exhs. 18 and 20, and the other employees were shown R. Exhs. 18 and 19.

and the salad room substituted cocktail sauce for salsa for nachos because the Respondent did not have any salsa at the facility; that Toledo did not tell him about the substitution; that a gentlemen from American West spoke to him insultingly about the fact that the sauce was the wrong sauce; that he told the gentlemen to behave like a human being and he should speak with Hurtado's supervisor; that he returned to the Respondent's facility to get the salsa sauce but when he arrived Toledo told him that they did not have any salsa in the house, and it was not his fault; that he went back to the airport, the plane had already left, and he apologized to the American West supervisor about not having the salsa for the nachos; that at the behest of his supervisor he wrote a letter of apology to the American West supervisor and he turned the letter over to his Supervisor Nunez; and that when he spoke with the American West supervisor the first time he did not raise his voice, he did not ignore the man's complaint, and he was not disrespectful. On cross-examination, Hurtado testified that as a coordinator he is responsible for making sure that the meals are up to airline specifications; that if the airline has a problem with something in the process, it looks to him to resolve the problem; that ultimately he was responsible for making sure that there were no problems in the process; that the flight in question was Toledo's and Toledo prepared it; that he reported this incident to Nunez and Rosario in Toledo's presence the same day it occurred; that it was Toledo's fault that the wrong sauce was sent to American West; and that it is the Company's policy that all complaints have to be responded to in writing. On redirect, Hurtado testified that Toledo made the entry in the Company's red book about the American West incident; and that the purpose of the entry was to inform the general manager of the Company. On rebuttal, Hurtado testified that he wrote a report in the red book about the fact that American West did not receive the salsa. However, when he was shown the red book while testifying on rebuttal, Hurtado was unable to locate the entry he allegedly made or the entry Toledo allegedly made. Hurtado also testified on rebuttal that at no time during this incident did he refuse to replace the cocktail sauce with the appropriate sauce, and he apologized to the station manager.

Rosario testified that if a coordinator receives a complaint from an airline, they are supposed to fill out a coordinator report and let the managers know what happened so when the complaint comes in the managers know how to answer; and that he never saw a coordinator's report from Hurtado on this incident.

On Saturday June 30, 2001, at about 3:30 p.m. Hurtado distributed union authorization cards to employees in the parking lot at the Respondent's facility. Hurtado testified that it was his day off; that the employees who received the cards were not on the clock; and that he turned the signed cards over to Armero.

General Counsel's Exhibit 42 is a one-page timesheet of the Respondent for its Miami facility dated "6–30–01." It does not have any "time in" or "time out" for Hurtado.

Grana testified that during the month of June 2001 Hurtado did not report to her that he was having any problems with his time card.

On July 4, 2001, Nelson Nunez, according to the testimony of Hurtado, approached him and said that he had been told that Hurtado had been collecting signatures for the Union. Hurtado testified that Nunez said that he was going to fire him because "you're not going to bring the union here" (Tr. 475); that Nunez said that he was going to fire him for another reason and not for what he was doing; that this was said in the presence of a new employee named Demaris; and that he told Nunez that he did not collect signatures during his worktime or on the job.

Nunez testified that he and Hurtado worked on July 4, 2001; that he never had any discussions about HERE Local 355 with Hurtado; that he never threatened Hurtado with termination based on his support of HERE Local 355; and that he never told Hurtado that he would find a reason to terminate him.

Demaris Fernandez testified that in July 2001 she was a flight checker and she worked with Hurtado in the dock area at the Respondent's facility in Miami[46]; and that at no time in July 2001 did she hear any manager or supervisor at Flying Food threaten Hurtado with termination or threaten Hurtado or anyone else because of their union activities.

On July 8, 2001, Demaris Fernandez received a responsibility counseling form (GC Exh. 64(a)) which refers to an incident which occurred on July 7, 2001, namely that only 33 meals were sent to a Northwest flight because the Respondent forgot to send two other ovens with a total of 34 meals in them. According to the counseling form, the Northwest station manager called the kitchen angry, and Fernandez, who was the flight checker, received a verbal warning.

Armero testified that portions of the petition in support of the Union were returned to him in June, July, and also August, 2001; that there were 76 to 78 signatures on the petition; that the printed information on the petition was in three languages, viz., English, Spanish, and Creole; that he turned the signed petition sheets over to the Board; that after the Union received the signed petition sheets "a letter was sent to the Employer . . . and I believe to Harvey Adelstein, from another organizer named John Beatty, [who worked in the Union's Broward County Florida office] letting him know that we still have a majority . . . [of] the workforce" (Tr. 283); that he first saw a faxed copy of the Beatty letter when he came back from a union convention in California at the end of July 2001[47]; that the Union did not receive a response from Adelstein so he did not know whether Adelstein received the Beatty letter; that the Beatty letter has the Broward office address; that the fax information at the top of the Beatty letter specifies "Jan. 14 2001" because the fax machine in Broward was never programmed; and that while he was in California for the union convention Beatty telephoned him and told him that he was going to send this letter to Adelstein and he would send a copy to Armero's office so that when he came back he could take a look at it. On cross-examination, Armero testified that between March 2000 and May 2001 he exchanged correspondence with Adelstein and he could not recall Adelstein ever not responding to him;

[46] She had been promoted to a coordinator position, GC Exh. 52(e), but she did not have her identification which would allow her to go to the airport so she continued to work as a checker at this time.

[47] The unsigned letter, with a union letterhead and dated July 20, 2001, was marked for identification as GC Exh. 29. It was not received in evidence.

that it would be uncharacteristic and disrespectful for Adelstein not to respond to a communication from the Union; that he confirmed that the signatures on the petition were authentic and belonged to current employees; that the signatures were dated June, July, and August 2001; that the union convention was held from July 16 to 24, 2001, and he left to go to Los Angeles, California, on July 16, 2001; that he faxed and mailed the petition to the Board before he left for Los Angeles; that he never made any attempt to find out why Adelstein did not respond to the Beatty letter; and that there was no cover sheet with the Beatty letter which was faxed to him.

Respondent's Exhibit 4 is the seven-page union petition with the names of those who signed deleted. The dates of the signatures were left on this document which was given to the Respondent by the Union pursuant to a subpoena. The dates go from "6–26–01" to "8/03/01."

General Counsel's Exhibit 48 is a letter from Projections, Inc. dated July 9, 2001, to "Dear Projections Client." It reads as follows:

> It is now, and always has been, our policy to produce videos for our clients that are professional, effective and compliant with the National Labor Relations Act.
>
> Recently, very small portions of our video "Little Card . . . Big Trouble" have been alleged to violate the Act. While there has been no official ruling handed down against the video, we have settled the issue by agreeing to change those portions of the tape which the NLRB alleges to be non-compliant, and we now have a new and revised version which has been reviewed by the Board's Regional Office in Hartford, Connecticut. Entering into this settlement, we did not admit that we violated the law in any way.
>
> Please return to us your old copy of "Little Card . . . Big Trouble," and we will exchange it for the revised video.
>
> We at Projections value your past business and look forward to being able to serve you in the future on any employee communications needs you may have. Please do not hesitate to call us on any questions regarding this matter.

Heston testified that the Respondent received this letter from Projections, Inc.

Nunez testified that he received an email dated July 11, 2001, from Jeffrey Anderson, who is the station manager of America West Airline in Miami. The email refers to the aforementioned June 28, 2001 incident and claims that Hurtado was disrespectful and had an arrogant attitude. In receiving the e-mail (R. Exh. 11), I ruled that it was being received in relation to the subsequent action Respondent took but if this out of court statement was being offered for the truth of the matter being asserted, Anderson would have to testify at the trial herein. The Respondent did not call Anderson as a witness. Nunez testified that it was his understanding that Hurtado, when questioned by the station manager of American West, refused to replace the cocktail sauce with salsa. On cross-examination, Nunez testified that he called Hurtado into his office and he spoke with Hurtado either the same day or the day after he received the email, telling him that there would be an investigation; that no one else was present during this conversation; that Hurtado told him that he found out about the fact that cocktail sauce was included instead of salsa when the station manager at American West told him and it was too late to change it; that he spoke with Toledo about the email but he did not recall whether he told Toledo about what Hurtado said happened; that Hurtado was the one who put the flight together in the kitchen and he probably took the wrong dip for the nachos; that he did not believe Hurtado when he said that he did not refuse to replace the cocktail sauce with salsa; that he believed Hurtado when, as alleged by Nunez, Hurtado told him that there was no more salsa and he put the cocktail sauce in; that in July 2001 there were times when Toledo put a flight together and it was possible that Toledo put the involved flight together; that when he asked, Toledo told him that he did not put the involved flight together and Hurtado did "everything" (Tr. 1147); that he did not ask Toledo who put the involved flight together not because Hurtado told him that Toledo did; that Hurtado did not tell him that Toledo had put the involved flight together; that he did not recall ever receiving a written report from Hurtado regarding this incident; and that as far as he recalled, this is the first time that the Respondent had received a complaint from a customer about Hurtado's attitude.

On July 12, 2001, Hurtado was scheduled to arrive at work at 1 p.m. Hurtado testified that he telephoned work and told Gate that he was going to be late because he was having car problems; that he arrived at work at 3 p.m.; that as he arrived at work Raphael Rosario sent him to the airport to coordinate a flight that was going to Italy; that when he returned to the Respondent's facility Rosario was in a meeting and so he put his name and time, 4 p.m., in the adjustment and sick log book (log); that later Rosario told him "that was not the time that I had come in" (Tr. 489); that Rosario signed the log book in front of him[48]; and that Rosario told him that he would sign it, not to worry about it, he would sign it. On cross-examination, Hurtado testified that he did not have car problems on July 12, 2001, but rather he was at the Board giving an affidavit; that when he arrived at work he immediately got in a truck and went to the airport to service a flight from Italy; that Rosario did not go with him or stay with him, and he, Hurtado, went with the driver himself to coordinate the flight; that while he came in at 3 p.m. he wrote down 4 p.m. in the log; that as indicated by Respondent's Exhibit 5, he put 3:30 p.m. in the log; that his name appears twice on the log for July 12, 2001, and Rosario initialed the other entry which is for 4 p.m.; and that Rosario signed the entry he, Hurtado, made and then Rosario made an entry for 4 p.m. On rebuttal, Hurtado testified that when he arrived at work late on July 12, 2001, he went into the Respondent's facility before going to the airport; that Rosario did not go with him to the airport that day; that he indicated in the adjustment log that he arrived at the Respondent's facility at 15:30 or 3:30 p.m.; that he left for the airport at maybe 4:30 p.m.; that the flight was scheduled for departure at 5 p.m.; that it takes about 15 to 18 minutes to drive from the Respondent's

[48] Actually Rosario initialed the log book.

facility to the airport; and that he did not remember what time he arrived at the airport on July 12, 2001.

Rafael Rosario, who at the time of the hearing herein worked as a ground coordinator for Air Jamaica, worked for the Respondent from 1997 to 2001. He was a transportation manager for the Respondent in 2001 in charge of scheduling for the transportation personnel and all of the airline catering scheduling. Rosario supervised drivers, coordinators, and the supervisors who worked under him, and he was responsible for setting Hurtado's work schedule. Roasrio prepared Respondent's Exhibit 8, which is the coordinator schedule for July 6–12, 2001. Rosario testified that on July 12, 2001, Hurtado was supposed to be coordinating Alitalia Flight 631 which was scheduled to depart at 4:30 p.m.; that to insure that Alitalia Flight 631 departed on time, Hurtado had to leave the Respondent's facility at 2 p.m. to coordinate the flight; that Hurtado was scheduled to arrive at work at 1 p.m. on July 12, 2001; that Hurtado arrived at work at 4 p.m. on July 12, 2001; that on his way to the airport at 4 p.m. on July 12, 2001, he saw Hurtado parking his car and he picked Hurtado up and drove him to the air cap; that he then returned to the Respondent's facility and he left Hurtado there to turn over the prepared food and equipment to the flight attendants; that Hurtado returned to the Respondent's facility about 5 p.m. after the flight took off; that he signed Hurtado in the adjustment log for 4 p.m. so that Hurtado could get paid (R. Exh. 5(c)); that he made this entry just before he left the facility at 8 p.m.; that only managers, supervisors, and the dispatchers are allowed to write the time in for employees in the adjustment log[49]; that employees are not allowed to write in the adjustment log; that Hurtado did not report for work at 3:30 p.m. that day; and that Supervisor Toledo initialed in the "supv. apprv." column certain of the entries on the adjustment log for July 12, 2001. On re-cross, Rosario testified that on July 12, 2001, he received a telephone call from Northwest Airlines asking for the truck.

On July 13, 2001, Hurtado was scheduled to arrive at work at 4 a.m. He arrived at work at 5 a.m. but when there was no supervisor in front of dispatch he indicated in the log book that he arrived at 4 a.m. Hurtado testified that Rosario asked him about the entry in the log book and he asked Rosario not to give him a warning because other employees came in late and Rosario would sign the log book for them; and that Rosario initialed his 4 a.m. entry. On cross-examination, Hurtado testified that he was getting paid for an hour he did not work and this was against company policy.

[49] Rosario testified that he told the dispatchers that when he was busy they should put the employee's name and time in the adjustment log and he would sign it later. He did not tell the dispatchers anything about the code column and the dispatchers were not allowed to initial the entries. According to Rosario's testimony, the only way someone can access the adjustment log is for a dispatcher to give it to them. Also Rosario testified that he instructed the dispatchers to put the time that they see the employee come in in the adjustment log and if the employee wants the dispatcher to put a time in the log other than when the dispatcher sees the employee, that dispatcher is supposed to tell the employee to get a supervisor. Further Rosario testified that dispatchers are not authorized to make changes to the adjustment logs.

Rosario testified that Hurtado was scheduled to commence work on July 13, 2001, at 4 a.m.; that Hurtado came to work at 5:30 a.m. on July 13, 2001; that he himself came to work at 6 a.m. on July 13, 2001; that there is a 4 a.m. "Time In" entry for Hurtado in the July 13, 2001 adjustment log (R. Exh. 6(c)); that he did not recall the signature in the supervisor's box for this entry; that when he came in at 6 a.m. they were having a problem (leaving late for the airport and missing a lot of items) with the first flight going out of the kitchen, which was the flight that Hurtado was supposed to be coordinating; that he has never signed in an employee for a time other than the time he knew the employee reported for work; that Hurtado never told him that his card would not work in the timeclock; that Hurtado could have received a new card the same day he reported it; that if an employee's card is broken, it will not work some of the time; and that he believed that in July 2001 Hurtado had some time punches which would mean that his card was working at that time. On cross-examination, Rosario testified that he did not recall signing Hurtado's entry in the adjustment log for July 13, 2001, but it could be that it was given to him on Saturday; and that Grana did not ask him why there were two entries for Luis Borja on the adjustment log for July 13, 2001. On recross, Rosario testified that he changed one of the entries for Borja on the July 13, 2001 adjustment log to 1600 but he did not remember what it was changed from. Later Rosario testified that on July 13, 2001, Borja came in at 4 p.m., he saw him at 4 p.m. but the dispatcher did not see him until 4:30 p.m. and this is why he changed the log to 1600 (or 4 p.m.) apparently from 1630.

By responsibility counseling form dated "7–15–01" (GC Exh. 65), employee Berthony Lemineur received a verbal warning indicating, as here pertinent, "Nelson [Nunez] stated to you that you are required to clock in and out on a daily basis. In the last 18 work days you had 15 days of adjustments, which you did not clock/punch in or out" and "You must arrive at your scheduled time." Grana testified that she knew that this individual was verbally counseled. On redirect, Grana testified that Lemineur had not received any prior counseling for excessive use of the adjustment log or failing to clock in prior to this discipline.

On Monday July 16, 2001, Rosario, according to his testimony, went to payroll and spoke with Grana. Rosario testified that he went to check what time Hurtado came in on July 13, 2001, because the supervisor who was on duty, Bernie Toledo, told him that Hurtado came in at 5:30 a.m. and there was a problem with the flight; that when he asked Grana what time Hurtado came in on July 13, 2001, she said, "[y]ou sign it [the adjustment log]. Look like you sign him in, someone sign him in. Look, four in the morning" (Tr. 777); that Grana also showed him that Hurtado was signed in twice on the adjustment log for July 12, 2001; that he told Grana that Hurtado came in to work at 4 p.m. on July 12, 2001, and he took him to the airport; and that they decided to speak with Hurtado when he came back to work on Wednesday, July 18, 2001. On cross-examination, Rosario testified that he did not check the adjustment log on Friday before he left work and nothing occurred on Monday July 16, 2001, to cause him to think about what had happened on the previous Friday. On redirect, Rosario testified

that he went to Grana on July 16 to make sure what time Hurtado came in because Toledo told him that Hurtado came in at 5:30 a.m.; that he did not know whether Hurtado had punched in or signed in and this is why he went to payroll to ask; that he looked up Hurtado's time records for July 12 and 13, 2001, because Hurtado was causing the company problems; that both of Borja's entries for July 13, 2001, had the same entry time so they would not be investigated; and that a question arose regarding Hurtado's two entries on the July 12, 2001 log because one was for 3:30 p.m. and the other was for 4 p.m., and a determination had to be made which was correct for payroll purposes.

According to Grana's testimony that the timeclocks are programmed so that an employee cannot punch in more than 7 minutes prior to the start of the shift and cannot punch out more than 7 minutes after the end of the shift. Department managers have cards which can override the system and if it is past the employee's start time, the managers or dispatch clerks can log in the employee's start time in the sick and adjustment log which was kept in the dispatch office next to the timeclock.

On July 18, 2001, Hurtado was given a final warinng (GC Exh. 37), in Grana's office.[50] In addition to Grana, Raphael Rosario and Nelson Nunez were also present. Hurtado testified that Grana said that he had various warnings, it was unacceptable, and she had to fire him; that he wrote on the warning that he intended to make a response to the gentlemen from American West; that during this meeting certain of his "time in" entries in the log book were discussed; that he uses his identification card to punch the timeclock and his card would not work in the timeclock for 4 or 5 months before this; that dispatch kept the log book; that when his card stopped working in the timeclock he told Grana and his Supervisors Nunez, Toledo, Rosario, and Largaespada; and that when there was no supervisor available, he would put his name and arrival time in the log book and later tell the supervisor so the supervisor could initial the entry. On cross-examination, Hurtado testified that he told Grana that other employees had written themselves in the log; that he was told that he would be suspended pending an investigation of what he would provide for them to review; and that he did not provide the names of other employees who had written their own names in the log.

Rosario testified that he and Grana met with Hurtado on July 18, 2001, at about 5 p.m.; that Hurtado took the adjustment log sheets out of Grana's hands and he wrote on them, saying that he wanted to fix the entries; that Hurtado was told that he was suspended pending an investigation; that he needed to speak with Toledo, the supervisor who was on duty the morrning of July 13, 2001; that Hurtado said that he wanted to take the matter to the Union, and Grana told Hurtado that he had to do what he had to do; that neither he nor Grana threatened Hurtado with termination if he went to the Union; that Hurtado was suspended for 3 or 4 days; that while Hurtado was suspended he "got with Bernie [Toledo] and . . . [Grana] . . . to make sure that . . . [Hurtado] came in at 5:30 [a.m.]"; that Hurtado came to work on July 13, 2001, at 5:30 a.m. and not 4 a.m.; that following Hurtado's return to work after his suspension, he did not have any further meetings with Hurtado where his log ins were discussed; that on July 18, 2001, he gave Hurtado a final warning (GC Exh. 37) for the American West incident; and that the meeting with Hurtado regarding General Counsel's Exhibit 37 occurred earlier than the meeting with Hurtado regarding the adjustment log and Grana was not present when he met with Hurtado regarding the warning over the American West incident.[51] On cross-examination, Rosario testified that during this meeting Grana did not give the copies of the adjustment log she had to Hurtado but she showed Hurtado the copies while she was at the desk about 1 foot away from Hurtado; that after Hurtado was told that he was suspended pending the investigation, "[t]hen I went and investigate[d], talked to Bernie [Toledo, the supervisor on duty], found out what's happening" (Tr. 841), to make sure about the time Hurtado came in on July 13, 2001; that when Hurtado said that he was going to take this to the Union, Grana said that he should do what he had to do; and that he did not know that Hurtado supported the Union before Hurtado made this statement.

Grana testified that she and Rosario met with Hurtado in her office on July 18, 2001; that when she showed Hurtado a copy of the adjustment log and asked him why was a manager told that he had come in at a certain time, and his manager had written in about an hour and a half after the time Hurtado stated that he had come in, Hurtado took the copy of the adjustment log from her hand and corrected it; that Respondent's Exhibit 5(c) is the original page from the adjustment log for July 12, 2001, Respondent's Exhibit 5(a) is a copy of that page, and Respondent's Exhibit 5(b) is the copy of the adjustment log for July 12, 2001, which Hurtado changed in Grana's office from 15:30 to 16:30, which was 30 minutes later than the time entered by Rosario, namely 16:00; that Respondent's Exhibit 6(c) is the original adjustment log page for July 13, 2001, Respondent's Exhibit 6(a) is a copy of that original page, and Respondent's Exhibit 6(b) is the copy that Hurtado altered in Grana's office, changing the start time from 4 a.m. to 5:30 a.m.; that Shift Supervisor and Manager Largaespada wrote Hurtado's name on line 10 of Respondent's Exhibit 5 with a time in of 15:30; that Hurtado told her that he was aware of company policy but he

[50] The responsibility counseling form indicates that the date of the involved incident is "6/28/01." The "details of the incident" are as follows:

> The station Mgr. of AWA was very upset because on flt. # 558 they complained to you about the sauce. He stated that you tried to ignore the complaint and that you got very defensive and argued with the customer. He also stated that you were very disrespectful to the customer.

"Final Warning" is circled on the form. The "Improvement Plan" reads as follows:

> You should never argue with a customer. You should always try to resolve the problem without arguing with the customer. If you are unable to resolve the problem, you must communicate it with your supervisor.

[51] Rosario testified that at one point that he and Grana gave Hurtado the write up. Perhaps he meant that Grana participated in the drafting of the write up. At another point Rosario testified that he did not know who prepared GC Exh. 37. According to Rosario's testimony, he and Nunez met with Hurtado regarding the warning over the American West incident.

knew of other employees who wrote their names and times in the log book because sometimes managers would forget; that when she asked for the other employees' names Hurtado gave her the names of two other employees, Damaris Fernandez and Adriana Salinas, who had written in the adjustment log, and she disciplined both of these employees[52]; that when she met with Salinas on August 2, 2001, she told her that she was receiving a verbal warning to document the adjustments that she had in her record, it is against company policy to have so many adjustments, and all hourly employees are required to clock in and out on a daily basis; that when she and Rosario met with Hurtado on July 18, 2001, Hurtado told her that he was going to talk to the Union about the disciplinary action form and she told Hurtado that if he felt that he needed to, he should go ahead; that she never told Hurtado that going to the Union would just result in further discipline; and that before Hurtado's statement she did not know Hurtado's feelings about the Union. On redirect, Grana testified that the Respondent's policy regarding falsification of company records is that the employee would be disciplined up to and including termination.

Nunez testified that he met with Hurtado in Grana's office, with her present, about the American West June 28, 2001 incident; that no one else was present; that Hurtado told him that he did not have the salsa so instead he put the cocktail sauce in for the nachos; and that General Counsel's Exhibit 37 is the counseling form regarding the discipline that Hurtado received over the June 28, 2001 incident. On cross-examination, Nunez testified that Grana did not speak during this meeting; and that when Hurtado was called into Grana's office, the counseling report was already filled out.

On July 25, 2001, Hurtado received a "Final Warning/Suspension for 2 days" from Grana in her office (GC Exh. 38.[53] Hurtado testified that Nunez was present; that he wrote on the form that he was not in agreement with what was written on the document; that on July 25, 2001, he also received another "Final Warning/Suspension for 2 days" (GC Exh. 39), for incidents dated "6/15–7/12/01"[54]; that Grana, Nunez, and Rosario were present when he received General Counsel's Exhibit 39; that he wrote on the form that he was not in agreement with the information being given in this document; that Grana said that she could not accept his conduct and she had to fire him whether he was going to speak to the Union or not, or whether he made allegations to the Labor Department; and that at the direction of Grana, her secretary tried Hurtado's identity card in the timeclock and she advised Grana that the card did not work. On cross-examination, Hurtado testified that while he remembered that Nunez was at this meeting, he did not remember if Rosario was there also; and that Grana told him that she was going to give him the benefit of the doubt and he would not be disciplined beyond the suspension. On re-cross, Hurtado testified that during his meeting with Grana on July 25, 2001, when she showed him copies of the July 12 and 13, 2001 pages of the Adjustment log he changed the entries on the two sheets during this meeting.

On rebuttal, Hurtado testified that on the day in July 2001 when he "received the disciplines" (Tr. 1800) Grana neither discussed anything with respect to a policy concerning the adjustment log, not did she ask him if he knew anything about not being allowed to write in the log as an employee; that he knew of other employees who had a practice of signing the adjustment log but he did not remember their names and he did not mention their names to Grana during this meeting (As noted above, Hurtado testified that the question of other employees writing in the adjustment log came up at the July 18, 2001 meeting.); that to his knowledge, there was no policy in place with respect to writing in the adjustment log before he was disciplined; that he did not recall if there was a policy regarding attendance and timeliness implemented for all employees after he was disciplined[55]; and that during the disciplinary meeting he made the changes to Respondent's Exhibits 5(b) and 6(b) in Grana's office when he was directed by Grana to put down the time he checked in, the papers were on her desk, and he did not snatch or grab them out of Grana's hands. On cross-examination, Hurtado testified that he knew Damaris Fernandez but he did not know if she ever made an entry for herself in the adjustment log; that he did not know Adriana Salinas by name; that the original entries he made in the adjustment log were incorrect; and that he knew at the time he made the involved entries in the adjustment log book that the information was incorrect.

Regarding Respondent's Exhibit 39, Grana testified that Hurtado had written his time in the adjustment log which only managers are allowed to do; that there were some incidents about Hurtado falsifying time records; that for 1 day there were

[52] R. Exhs. 41 and 42, respectively. Both are memorializations of verbal warnings. Grana testified that these two employees were given verbal warnings because they had no prior incidents. Both of these responsibility counseling forms are dated "8/2/01." Both refer to the number of adjustments these employees had in the past month and both indicate "You must punch in and out on a daily basis." Neither form refers to the employee herself writing her name and the time in the adjustment log. On redirect, Grana testified that neither Fernandez or Salinas, to her knowledge, received prior discipline regarding excessive use of the adjustment log or any other timekeeping matters.

[53] The dates of the incidents given on the responsibility counseling form are "7/12/01 & 7/13/01." The "details of the incident" portion of the form reads as follows:

> On the days stated above you arrived late to work and you did not punch in or out at the time clock. You also told a manager to write you in on the adjustment log earlier than your actual arrival time on both days. You even took my copies of the adjustment log and changed them to what your management had stated that your actual time was.

The "Improvement Plan" portion of the form reads as follows: "You must arrive at your scheduled time at all times and you must punch in and out daily. No excuses will be accepted."

[54] The "details of the incident" portion of the form reads as follows:

> 1/11/01 and 5/05/01 you have been warned about your tardiness and not punching in and out on a daily basis. In 21 days that you work[ed] you had 12 adjustments. This is unacceptable.

The "Improvement Plan" portion of the form reads as follows:

> You are required to clock in and out on a daily basis. You cannot write anything on the adjustment log. It is only for management or authorized personnel only.

[55] Hurtado testified about a period when his ID card worked but he had to have a supervisor punch him in and out. Hurtado, however, was not sure when this occurred in that he could not remember the day or the month or even the year this allegedly occurred.

two entries for Hurtado and two different managers had signed a different time for coming in; that Rosario was present for the meeting she had with Hurtado on July 18, 2001, but Rosario was not present for the meeting she had with Hurtado on July 25, 2001; and that Hurtado was suspended a total of 4 days in July 2001, with 2 of the days reflected on General Counsel's Exhibit 38 and 2 of the days reflected on General Counsel's Exhibit 39. On cross-examination, Grana testified that she completed the entire document (GC Exh. 39), on July 25, 2001. Subsequently Grana testified that she did not recall having someone check whether Hurtado's card worked in the timeclock on July 25, 2001, but she did not think this happened because Hurtado did not tell her that the card was not working at the time.

On July 26, 2001, according to Hurtado's testimony, Grana gave Hurtado a new card but it did not work in the timeclock, Hurtado had to call his supervisor to get authorization, and again his time was reported in the log book.

Grana testified on direct that Hurtado asked for a new timecard after she spoke to him about having to many entries in the adjustment log; that Hurtado told her that his card was not working; that she had the payroll clerk make him a new one so he wouldn't have that problem; and that she believed that this occurred in July 2001.

Demaris Fernandez testified that employees are not allowed to write in the adjustment log; that she received a verbal warning for failing to punch in and out and before this warning she had never been disciplined for any attendance violations or for failing to punch in and out; that her I.D. badge does not work when it gets old and so she cannot use it to punch in or out; that she received this verbal warning when she was breaking in for flight checker because she would get to work early and forget to punch in[56]; that Grana gave her the warning; and that she had to have her badge replaced once since July 2000 and that occurred 4 or 5 days before she testified herein on May 7, 2002.

Grana posted Respondent's Exhibit 43 on August 13, 2001. It is an attendance and timekeeping policy statement. Grana also put in big bold letters on the bottom of the adjustment log that any employee falsifying or altering the adjustment log would be disciplined up to and including termination.

General Counsel's Exhibits 47(a) through (kkk) are PAFs of the Respondent which collectively document resignations, discharges, layoffs, and voluntary quits in the first 8 months of 2001.

General Counsel's Exhibit 55 is a list of active employees at the Respondent's Miami facility from January 1 to August 31, 2001, as well as a list of terminated employees for the same period.

Burgos testified that General Counsel's Exhibit 3 is the employee handbook which was in effect for the employees at the involved Miami facility in 2001; and that the handbook indicates that it was "Revised January 2001" but he did not know what period that handbook was in effect at the involved Miami facility. The following appears on page 22 of General Counsel's Exhibit 3:

> ***Unions***
>
> At Flying Food, we are committed to a Company's philosophy of maintaining a workplace free of unlawful discrimination and fully utilizing our "Open Door" policy. Flying Food strongly believes that individual consideration in employee/supervisor relationships provides the best climate for maximum development, teamwork and the attainment of our goals.
>
> The majority of the American work force, as well as the majority of Americans employed in the food service industry, do not belong to unions (less than twelve percent [12 %] nationally). Union free status is decided by the choice of our employees, under rights guaranteed to them by federal labor laws.
>
> We do not believe that third party representation of our employees is necessarily in the best interest of our employees or of the Company. We enthusiastically accept our responsibility to provide good working conditions, good wages and benefits, fair treatment and the personal respect that is rightfully yours. All this is a part of your job with our Company and need not be "purchased" by you from an outside third party. Please remember that the presence of a union will not guarantee that you and your fellow colleagues will receive any benefits that could not otherwise have been enjoyed without a union .
>
> At Flying Food, you already have the full opportunity to express your concerns, suggestions and comments to us directly so we can better understand each other. We do not need a third party to continue this long-standing policy. As a team, we can resolve issues, implement new ideas and provide useful information and clarification.
>
> Where a union is already present, we pledge to abide by the rules set forth in the collective bargaining agreement and to bargain in good faith. This handbook, which is applicable to all employees, sets forth the policies and rules, except where it is contradictory to any applicable labor contract, in which case the labor contract provisions shall apply for the bargaining unit employees.

Grana testified that Heston sent her General Counsel's Exhibit 3 from the corporate office in Chicago, Illinois, in May 2001, with instructions not to distribute the employee handbook to employees at the Respondent's Miami facility because "we were in negotiations with a union" (Tr. 1475); and that the handbook was not distributed to employees until around June 2001.

Armero testified that if a company under the jurisdiction of the National Labor Relations Act, like the Respondent, has a collective-bargaining agreement with the Union, the new hires can make a determination as to whether they want to become a union member or not.

Burgos testified that he was involved in the negotiations for the first collective-bargaining agreements at JFK and Midway, and it took roughly 9 months to negotiate the former and 11 months for the latter; and that negotiations for a collective-bargaining agreement at San Francisco, which started about

[56] According to GC Exhs. 52(d) and (e), which are PAFs, the effective date of the transfer to the flight checker position was "5/11/01" and the effective date of her promotion to coordinator was "6/17/01."

March 2001, were interrupted after September 11, 2001, but negotiations were scheduled to resume in April 2002.

Mazier has worked for the Respondent for about 6 years. He testified that his job title is maintenance supervisor; that he does not supervise any employees in the maintenance department; that he reports to the Nunez; that in the mornings he, by himself, delivers equipment to the lunchroom of the pilots for UPS, which takes about 2.5 hours; that he then returns to the Respondent's facility and he, by himself, maintains the equipment used in the production area; that he purchases the parts for repairing the equipment; that he does not punch a timeclock; that employees in the production area punch a timeclock; that Nunez does not punch a timeclock; that he receives a work schedule every Friday (GC Exh. 5[57]; that he is not eligible to receive overtime pay; that the employees who work in the production area are eligible to receive overtime pay; that on his **"PERFORMANCE REVIEW, MANAGEMENT/EXEMPT EMPLOYEES,"** form General Counsel's Exhibit 6, which has a job title of maintenance, he signed on the "Employee's Signature" line on "01–30–01" and Wilsher signed on the "Manager's Signature" line; that he received a pay raise in 2001[58]; that he is not in favor of or against the Union; that General Counsel's Exhibit 9 references a meeting he had with an attorney with respect to an appointment he had with the Board[59]; and that he did not pay the attorney, R.T. Kofman, any money for meeting with him.

Respondent's employee Noguera testified that while Mazier could not discharge employees, he could give his opinion to the administration and most likely the employee would be fired or suspended. Noguera did not know of anyone who Mazier said should be fired. According to Noguera's testimony, Mazier could not lay off employees, give a wage increase, promote employees, transfer employees, or resolve employee grievances.

Morales testified that Mazier gave him the paper work for getting an airport identification badge and he returned the paper work to Mazier; and that Mazier's badge specifies "Maintenance Manager." On cross-examination, Morales testified that he has seen Mazier working with Angel Sanchez doing repairs and he has not seen Mazier perform repairs with anyone else. Morales also testified that there are two IDs for the airport and Mazier is responsible for the paper work on both applications. Morales testified that he also helped drivers fill out their applications for customs and the airport; and that the help he gave was the same kind of help that Mazier gave to him. The application forms for identification badges are in English.

On cross-examination, Treto testified that Mazier was a supervisor who was responsible for the employees obtaining identification badges, Mazier also got involved in transportation, Mazier could discipline employees, but he could not name any employee at the Respondent who reported to Mazier.

Hurtado, who has worked for the Respondent at its Miami facility for about 6 years, testified that he did not know Mazier as a supervisor in the years that he had been at the Respondent's facility.

Adelstein testified that it is the Respondent's position that Mazier is not a supervisor and when he was advised that Mazier was contacted by the Board and wanted an attorney, he advised the Respondent that he did not believe that his firm should be representing Mazier; and that he told Burgos, who said that the Respondent was willing to pay the fee, that he would get a lawyer for Mazier. On cross-examination, Adelstein testified that Kofman represents management in labor relations matters; that the bill was sent to his attention and he did not forward it to Mazier but rather he forwarded it to the Respondent to pay; and that he did not know if the bill had been paid or not.

Grana testified that those of the Respondent's employees, supervisors or managers who as part of their job go to the Miami Airport must go through a background check and get an airport ID badge; that Miami International Airport issues the

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[57] The document is titled **"MANAGEMENT SCHEDULE."** Mazier is 1 of 14 people listed on the document for the week of October 1, 1999. In the column designated **"POSITION"** 10 of the 14 people listed hold a position which is specifically designated on the document as "manager" or "supervisor." The four exceptions are the executive chef, the controller, who is Monica Wilsher, mechanic, who is Angel Sanchez, and maintenance, who is Mazier.

[58] GC Exh. 7 is the "PERSONNEL ACTION FORM" which is dated "1–01–01." It designates the involved position as "Dishrm. Supv."

[59] As here pertinent, the invoice reads as follows:

LAW OFFICES

STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.

2200 Museum Tower
150 West Flagler Street
Miami, Florida 33130

DARIO MAZIER — August 30, 2001
c/o Neal, Gerber & Eisenberg — 15602958
Attention: Harvey Adelstein — ....
Two North LaSalle Street, Suite 2200
Chicago, IL 60602

For Professional Services Rendered Through July 31, 2001

Our matter #36339,0001
NLRB Investigation

Date	Attorney	Description
07/18/01	RTK	Conference with Mazier regarding Representation; preparation of representation doument;
07/18/01	ALR	Draft representation let ter to D. Mazier;
07/19/01	RTK	Review documents received from Harvey Adelstein regarding background of NLRB Charges; conference with Dario Mazier regarding representation;
07/24/01	RTK	Meet with Harvey Adelstein to discuss Back ground facts and preparation for interview Of Dario Mazier;
07/25/01	RTK	Conference with Dario Mazier to prepare for his Interview with the NLRB;

. . . .

"RTK" is R.T. Kofman and "ALR" is A.L. Rodman. The hours, rate, and dollars on the invoice are not included here. The total due as specified by the invoice was $2,349.50.

airport ID badge; that Mazier or, when he is not present, either Sanchez or Boada, completes the paper work (R. Exh. 45) for the employee's ID badges[60]; and that Mazier and Sanchez were not authorized to sign on behalf of the Respondent with the Miami-Dade County Aviation Department. On cross-examination, Grana testified that in 2001 Mazier was promoted to dish room supervisor but she did not remember the date of the promotion; that she signed General Counsel's Exhibit 7 on "6/22/01," which as noted above is a PAF for Mazier which describes his position as dish room supervisor, and which has an effective date of "1–01–01"; and that General Counsel's Exhibit 66 is a PAF she wrote up and signed on "5/1/01" which has an effective date of "4/30/01," and the form represents the fact that Mazier "was changing from a maintenance mechanic to a dish room supervisor" (Tr. 1733). Subsequently, Grana, especially in view of the fact that she wrote and signed both forms, was asked to explain the apparent documentary contradiction as to when Mazier became a dish room supervisor. After apparently testifying that Mazier was a dish room supervisor in January 2001, Grana ultimately testified that she was not sure when Mazier became a dish room supervisor.

Sanchez worked for the Respondent at its Miami facility for 4 years. He testified that before September 11, 2001, there were three mechanics, including himself, in the maintenance department; that the other two mechanics, Jared Garmley and Francisco Alzate, left after September 11, 2001; that he maintains the 17 trucks that Respondent has in Miami; that he purchases the repair parts for the vehicles after he gets authorization from his manager, Nunez, or Diamond, or Vidal; that as indicated by General Counsel's Exhibit 12, on August 15, 2000, he received a certificate of achievement for the successful completion of "The Responsibility Counseling Workshop, Management Training Series" which was cosigned by Heston and Diamond; that the workshop dealt with counseling employees; that he never had occasion to use the training because he was not counseling employees; that he has never made a recommendation to the human resources manager about counseling an employee; that when he received the training there was only one other employee working with him; that he signed General Counsel's Exhibit 10, which is a "PERFORMANCE REVIEW MANAGEMENT/EXEMPT EMPLOYEES" dated "8/22/01"[61]; and that he signed General Counsel's Exhibit 11 on the line for "Supervisor/dept. Head Signature," which is "Flying Food Group, Responsibility Counseling Form" dated "5/23/01" but human resources decided the discipline in this situation and he did not make a recommendation. Sanchez further testified that the other two mechanics picked up parts, he would send them if he was not available, and he would get approval to purchase the parts from the general manager. Also, Sanchez testified that the other two mechanics punched a timeclock and he did not. General Counsel's Exhibit 13 is a "PERSONNEL ACTION FORM" for Sanchez dated "3/1/01" which under "POSITION" specifies "Mechanic/Shift. Mgr." Sanchez testified that other than the disciplinary action memorialized by General Counsel's Exhibit 11, he was not involved in the disciplinary action of any other employee. Subsequently Sanchez testified that the two other mechanics received their direction as to what to do on the trucks from him, the transportation manager and the operations manager; and that if the other two mechanics needed time off they spoke to the operations manager.

Gana testified that Sanchez had his own office.

Treto testified that when he started working for the Respondent in February 2001 Sanchez was a supervisor; that Sanchez ran transportation; and that Sanchez approached the drivers with authority as a supervisor and let them know that if they did not follow the company policies and procedures they would be dismissed. On cross-examination, Treto testified that Sanchez was a supervisor who used to run transportation; that Sanchez was a mechanic; that Sanchez does everything as far as fixing things; that Sanchez follows the schedule set by Nunez and Largaespada; and that Sanchez has filled in for absent drivers.

As noted above, Rosario testified that only managers and supervisors could sign or initial the entries in the adjustment log. Toledo's initials appear in the log.

In the beginning of May 2002, a week before she testified at the trial herein, Wilsher was asked by one of the attorneys for the Respondent, Harry Secaras, to confirm how many employees there were in the Flying Food Group Miami facility on April 18, 2001. Wilsher testified that when she had a question whether or when an employee was terminated she would telephone Grana who would give her the information based on some document Grana had; that she did not know where Grana got the information; and that she used Respondent's Exhibits 12 (titled Miami Payperiod Cycles—2001) and 16 (a payroll register) in her review.

Analysis

Paragraph 7 of the consolidated complaint alleges that since on or about January 30, 2001, Respondent failed and refused to provide a wage proposal to the Union. The General Counsel on brief contends that while the parties agreed to hold off any discussion of economic subjects until after noneconomic issues were addressed, there is ample record evidence to demonstrate the Respondent's reluctance to address economic subjects when the time arrived; that the Respondent maneuvered to avoid finalizing a collective-bargaining agreement; that since the Respondent did not present conclusive proof to support its claim that its Miami operation was in the midst of severe financial difficulties, it can only be found that Respondent's refusal to extend any type of counteroffer for economic subjects constitutes a failure and refusal to bargain in good faith; that the Respondent's continued insistence on an audit is unreasonable and constitutes bad-faith bargaining, *Tama Meat Packing Crop.*, 291 NLRB 657 (1988); that Vidal testified that in January 2001 the financial state of the Miami facility was pretty good and the company definitely expected more improvement; that the delay was solely for the purpose of getting beyond the certification year so that the Respondent could coerce employees to decertify the Union through the Respondent's actions and inaction at the bargaining table; that the Respondent's subsequent grant of

[60] An identification card (badge) is also required by the Department of Treasury, United States Custom Service. The application form is included in R. Exh. 45.

[61] Under "Job Title" the form specifies "Maint./shift supv." Sanchez signed the form on the employee's signature line.

retroactive wage increases after withdrawal of recognition strongly supports a finding that the Respondent's financial claim was a delay tactic to obtain time and opportunity to undermine union support and foment employee discontent, *S-B Mfg. Co.*, 270 NLRB 485 (1984); that the Respondent was aware of the employees' frustration; and that Respondent's hiring of new employees at higher wage rates was calculated to prove union impotence and belies the Respondent's claim of financial difficulties. The Respondent on brief argues that the parties agreed at the initial bargaining session that all noneconomic issues would be decided prior to turning to economics, and that point was not reached until the eighth bargaining session held on January 31, 2001; that the Respondent never refused to make an economic proposal; that the Union agreed to audit the Respondent's financial records; that when the Union decided not to audit the parties held another negotiating session; that, after the Respondent explained about the two new accounts, the Union agreed to wait until May 3, 2001, for the Company's economic proposal; that an employer does not violate the Act simply by refusing to make a proposal to raise wages or overall economic benefits as long as it engages in the bargaining process, *University of Vermont/Vermont Educational Television*, 258 NLRB 247(1981); that "the evidence establishes that the Union failed to make economic proposals which the Company could afford to accept"[62]; that while the evidence establishes that the Company's financial condition did not change between January 31 and March 28, 2001, the Air France and Northwest accounts were projected to have a substantial impact on the financial condition of the Respondent; and that the Respondent needed just a few weeks to assess the startups and it would be in a position to give a more favorable economic proposal and the Union agreed to that plan.

Contrary to counsel for the General Counsel's contention, the Respondent did not continually insist on an audit. Rather the Respondent offered to allow the Union to have its accountants audit the Company's finances for all of its operations and the Union initially accepted the offer. Also, contrary to the impression left by counsel for the General Counsel's contention, Vidal did not take the position that the financial state of the Miami facility was pretty good and the Company expected more improvement. Vidal was basically a credible witness. He no longer works for the Respondent. Some of his testimony contradicts that of Burgos, who, in my opinion for the reasons given below, is not a credible witness. Vidal credibly testified that the Respondent was losing between $3000 and $4000 a week in Miami before it obtained the Air France and Northwest accounts; that when the Respondent began servicing these two accounts its financial situation got worse; that it took months before the Respondent was able to determine whether the Air France and Northwest startups met its projections; that Air France reached about 70 percent of Respondent's projection and Northwest reached only 50 percent of the Respondent's projection; that the economic condition of the Company was not one of the reasons for granting the wage increase; and that the economic condition in Miami when management was discussing the wage increase was poor, the Company was struggling in Miami. Yet, approximately 5 weeks after Adelstein and Burgos would not give an economic proposal on March 28, 2001, which was a reiteration of their January 30 and 31, 2001 position, the Respondent gave a wage increase retroactive to May 4, 2001. I do agree with the contention of counsel for the General Counsel that the Respondent's subsequent grant of a retroactive wage increase after an unlawful withdrawal of recognition strongly supports a finding that the Respondent's financial claim was a delay tactic to obtain time and opportunity to undermine union support and foment employee discontent. The financial situation at the Miami facility had not changed from January 31, 2001, to when the retroactive wage increase was granted. And in the interim, as more fully discussed below, the Respondent (a) showed its employees at least one antiunion video as part of its plan to generate employee disaffection with their certified Union; (b) unlawfully had an agent and a supervisor, who misrepresented the purpose of the petition, collectively solicit signatures on a disaffection petition; and (c) unlawfully withdrew recognition of the Union citing a petition that it had to know would not withstand scrutiny by the Board, especially in view of the fact that the Company now must prove that the incumbent union has, in fact, lost majority support.[63]

[62] R. Br. 81. Since the Respondent never did offer an economic proposal, perhaps what the Respondent is arguing is that the Union did not succeed in bargaining against itself, and the Respondent should not be held responsible for that. The Respondent also argues that what Adelstein said to Balash on January 30, 2001, namely that the Union should just walk away from the unit, does not establish that Adelstein had no intention of reaching agreement with the Union. This argument must be viewed in the light of the fact that Adelstein is listed as one of two people to contact on his firm's labor and employment web site, GC Exh. 56, which site indicates, as here pertinent,

> Neal, Gerber & Eisenberg represents employers nationally in all aspects of labor and employment law, including employment counseling, union avoidance, collective bargaining and employment-related litigation before federal and state courts and federal, state and local administrative agencies. . . .
>
> The Firm's Labor & Employment attorneys, widely familiar with unions at the local and national levels, offer experienced representation in all aspects of the labor-management relationship. Beginning with union -avoidance and the union-organizing campaign, Labor & Employment practice group attorneys advise employers on what they can and cannot do to discourage union-organizing activity among employees. For example, the Firm successfully represents employers in numerous union-organizing drives each year and currently is advising a major meal provider to airlines on how to preserve its non-union status in an industry where all competitors have been organized.

On cross-examination, Adelstein testified that he really did not know which major meal provider to airlines the web site refers to; that his law firm represents only one major meal provider to airlines; that the one is Flying Food Group; and that he assumes that his firm's web site refers to Flying Food Group.

[63] *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). It was not indicated on the record herein that the petition, which was allegedly delivered during the night by some unknown person or persons to Grana's office, was also filed with the Board as a petition for decertification. As noted above, the withdrawal of recognition by one of the Respondent's attorneys occurred before the signatures on the petition were authenticated. And at the trial herein the Respondent did not call even one person who was conceded to be an employee to authenticate his or her signature on the petition, and explain what they did or did not

While the Respondent did not specifically state at the bargaining sessions on January 31 and March 28, 2001, that it refused to offer an economic proposal, that is exactly what it was doing at these two bargaining sessions. This is a situation where conduct speaks louder than words. Adelstein has a lot of experience representing management. While he may have unwisely shown his hand with the firm's advertising on the internet, in my opinion it is not reasonable to expect that he would have declared at the negotiating table "the Company refuses to make an economic proposal."[64] Since Adelstein would not place an economic proposal on the table, the Union, if it wanted to continue to avoid hindering the possibility of settlement, could do little else but wait for that which Adelstein knew would never occur.[65] What occurred was planned by the Adelstein. Citing the fact that the Respondent does have collective-bargaining agreements at some of its facilities is not really probative because the markets may be different at those facilities as compared to the Miami market. As was pointed out to the employees by Bergos, the Miami operation had already been sold more than once. It appears that the Miami market is a tough market and, as indicated in the web site of Adelstein's firm, Adelstein was and is advising the Respondent "on how to preserve its non-union status in an industry where all competitors have been organized." (GC Exh. 56.) The Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 7 of the consolidated complaint.[66]

Paragraph 8 of the consolidated complaint alleges that on or about February 14 and March 19 and 20, 2001, and on another date in or around late March/early April 2001, which is not more specifically known by the General Counsel, Respondent, through antiunion videos shown at meetings at Respondent's facility, solicited employees to decertify the Union. Counsel for the General Counsel on brief contends that a purpose of the meetings with the newly hired employees was to solicit support to decertify the Union through the presentation of antiunion videos. The Respondent on brief argues that as found by the administrative law judge, and adopted by the Board, in *Sodexho Marriott Services*, 335 NLRB 538 (2001), the video "Little Card, Big Trouble" is legitimate campaign propaganda and does not violate the Act[67]; that neither Noguera nor Hector Fernandez testified that the antiunion video contained any alleged threats or promises regarding the Union; that Treto's testimony about what Gin allegedly said about a union on a videotape does not establish a violation of Section 8(a)(1) as such statements are the kind of isolated statements which are devoid of any coercive intent; that any alleged unlawful purpose such as solicitation of decertification was negated by the fact that "Little Card, Big Trouble" was shown to new employees to educate them regarding their right to join or not join the Union; that many of the employees being hired by Respondent at the time formerly worked for companies where they were required to join the union; that Respondent had the right to tell employees that they did not have to join the Union, *United Technologies Corp.*, 274 NLRB 609 (1985)[68]; and that contrary to Treto's testimony that Gin appeared in a union video and threatened the loss of business opportunities, the evidence establishes that Gin does not appear in "Little Card, Big Trouble" nor does she make any statements about the Union during her appearance in the "Welcome to Flying Food" video.

Obviously the Respondent is not on the same footing as a company trying to convince its employees during an organizing drive that they should not sign a union authorization card or support a union. Here, the Union was certified on March 29, 2000, as the exclusive collective-bargaining representative of the involved unit. As here pertinent, the majority status of a certified union is conclusively presumed during the certification year. It is admitted that the Respondent showed at least one antiunion on more than one occasion before the certification year was over.[69] There is a conflict in the testimony of Burgos and Grana, neither of whom is a credible witness, with respect to whose idea it was to show the employees an antiunion

read, and what, if anything, they were told about the document before they signed it. The one employee the Respondent did call as a witness testified on cross-examination over the objection of Respondent's counsel that no one approached her about the Union in April 2001; that no one approached her with a piece of paper to sign regarding the Union; that she never signed a piece of paper; that she did not recall anyone approaching her in 2001 about the Union and asking her to sign anything; and that she did not remember signing a piece of paper with lines on it. If she did not sign the disaffection petition, then it would appear that what purports to be her signature is a forgery.

[64] While GC Exh. 56 indicates that it was printed "6/10/2002," Adelstein did not testify that the pertinent portion of this web site, which is updated periodically according to his testimony, was not in existence on January 30, 2001.

[65] As noted above, Balash testified that he withdrew the March 29, 2001 charge in the hope of reaching a settlement on May 3, 2001.

[66] The language in par. 7 of the consolidated complaint, viz, "on or about" is sufficient to cover the fact that the negotiation session, where the last of the noneconomic proposals were approved, occurred on January 31, 2001.

[67] *Sodexho Marriott Services*, supra, can be distinguished in that there the video "Little Card, Big Trouble" was shown during the course of the 1998 trial. Here the version of the "Little Card, Big Trouble" video shown to employees was not shown during the course of our trial. Indeed even though she subpoenaed it, counsel for the General Counsel was unable to get a copy of the Spanish version. Without the Spanish version, we do not know for sure exactly what was said and done in this video. Also that case involves an organizing drive. Here, the Union had been certified and the antiunion video was shown during the certification year. And finally while the judge found in *Sodexho Marriott Services*, supra, that the video shown in his courtroom in 1998 was legitimate campaign propaganda, as pointed out by GC Exh. 48, in July 2001, after it was alleged that a portion of the video "Little Card, Big Trouble" violated the Act, Projections, Inc. revised it and entered into a settlement with the Board's Regional Office in Hartford, Connecticut.

[68] *United Technologies Corp.*, supra, can be distinguished in that there, unlike here, (a) there was no suggestion that the employees should abandon their union; (b) the Respondent's communication occurred in the context of lawful conduct at the bargaining table, and it was therefore not undertaken as part of a strategy to frustrate the bargaining process of otherwise avoid bargaining obligations under the Act; and (c) there was no evidence that the Respondent in *United Technologies Corp.*, supra, case sought to achieve the elimination of the union or otherwise alter the bargaining relationship.

[69] Grana testified that she conducted her orientation sessions in March 2001.

video.[70] As noted above, Burgos testified that the Respondent's senior leadership group decided to show the original video from Projections because the Respondent hired employees from Gate Gourmet and Sky Chef, both of which operate under the Railway Act under which the employees have no choice regarding whether they would join or not join the union, and the Respondent wanted to make sure that the former employees of Gate Gourmet and Sky Chef understood that they had a choice when they came to work for the Respondent. Grana testified that she thought that the new employees should know about their choices and she requested something from Heston that she could show the employees about the Union. Was the message on the antiunion video limited to explaining that employees had a choice? The Respondent certainly does not take this position. Was the antiunion video shown only to former Gate Gourmet and Shy Chef employees? Burgos concedes that it was shown to other new hires also. It appears that the message conveyed to employees was not just that they had the right not to belong to the Union but that it is a problem if you belong. Whatever the message was on the version of the antiunion shown to employees it was strong enough to have Hector Enrique Fernandez Rodriguez and another driver subsequently approach Sanchez and tell him that "after seeing the video . . . [they] realized that [by signing union authorization cards they] . . . had gotten into a big problem and . . . [they] wanted to get out." (Tr. 394 and 395.) When Sanchez was given the opportunity at the trial to explain what on the video would make the drivers react this way, Sanchez went blank, claiming that he could not recall, other than it dealt with union authorization cards, what was on the video. Sanchez was not a credible witness. This former president of a Union Local in New York City knew exactly what was going on. To play dumb shows that he placed the Respondent's interests, for whatever reason, above being candid. Such a witness cannot be treated as a credible witness. An employer cannot encourage, prompt or solicit employees to decertify a union, especially in the certification year, and then claim the rewards of its conduct. *Rohlik, Inc.*, 145 NLRB 1236 (1964) The Respondent did not have a legitimate purpose in showing anti-union videos.[71] The conduct of the Respondent was calculated to discourage the continued union adherence of the employees. When this conduct is considered in the light of the conduct, treated below, of its agent Mazier, who—after the antiunion video which solicited employees to decertify the Union was shown to employees—solicited signatures on a disaffection petition in work areas when employees were working, a finding is warranted that the Respondent violated Section 8(a)(1) of the Act by showing antiunion videos on or about the dates specified in February, March, and April 2001.

Paragraph 9(a) of the consolidated complaint alleges that Respondent, through Daysma Grana, at Respondent's facility on or about February 14, 2001, threatened employees with loss of business opportunities due to their support for the Union. Counsel for the General Counsel on brief contends that telling employees that the Union would obstruct incoming business from new customers constitutes a violation of Section 8(a)(1) of the Act in that this conveys the impression of futility in selecting the Union as bargaining representative. The Respondent, on brief, argues that even if Treto's testimony is credited, the statement cannot support a violation of the Act, as it was an isolated remark which is devoid of any coercive intent. Grana is not a credible witness. It appears that Treto was mistaken about Noguera being at this meeting. Nonetheless, Treto's testimony is credited. As noted above, he testified that Sanchez and Grana said the Union would obstruct the progress of contracts for new business; that Sanchez said that the Union obstructs or stops the incoming business that they could obtain with new companies, and Grana said this also; and that Grana said that the Union would prevent the Company from getting new business. As pointed out by the Court in *NLRB v. Gissel Packing Co.*, 395 U.S.575, 618 (1969):

> an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . .

The involved prediction of Grana and Sanchez was not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." The Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 9(a) of the consolidated complaint.

Paragraph 9(b) of the consolidated complaint alleges that Respondent, through Daysma Grana, at Respondent's facility in or around February, March, or April 2001, on a date not more specifically known by the General Counsel, threatened to withhold wage increases due to employees' support for the Union. Counsel for the General Counsel contends on brief that Grana's statement to Treto, namely "if the Union is certified, there won't be a raise" implies that for as long as the Union is certified, the Respondent will not give a wage increase. The Respondent on brief argues that Grana unequivocally denied that she threatened employees that wages would be withheld if employees certified the Union. The Respondent cites the May meetings where wage increases were explained to the employees. Treto testified to what Grana said to drivers who were in the portal of the loading dock. Vidal testified that he and Grana

[70] The credibility of both will be discussed below. It is sufficient to note at this point that, in my opinion, Grana knowingly lied under oath about material facts, namely her role with respect to the disaffection petition. Ironically, before calling her as a witness, the Respondent's attorneys knew that the Respondent had the burden of proof to show that the Union had actually lost majority support. Yet the Respondent's attorneys did not call one employee witness to authenticate his or her signature, and to testify about what he or she read or what he or she may have been told before signing.

[71] One employee, Treto, testified that Gin also made antiunion statements in a video. Gin did not testify at the trial so she does not deny that she made antiunion statements on a video shown to employees. While the Respondent introduced R. Exh. 36, which is a transcript of a video in which Gin, among others, appears and speaks, no credible witness testified that this is the only video that Gin made which was shown to employees.

always met with the employees together to explain the wage increases. There is no evidence that Vidal was present when Grana and Sanchez spoke on this occasion. Grana did not specifically deny making this statement. Treto's testimony regarding Grana's statement, which was not specifically and credibly challenged by the Respondent at the trial herein, is credited. In my opinion counsel for the General Counsel's interpretation is correct. The Respondent violated Section 8(a)(1) of the Act in May 2001 by threatening to withhold wage increases due to employees' support for the Union.

Paragraph 9(c) of the consolidated complaint alleges that Respondent, through Daysma Grana, at Respondent's facility in or around early May 2001, on a date not more specifically known by the General Counsel, informed employees that they were receiving wage increases as a reward for decertifying the Union. The Respondent on brief argues that transcript pages 1555 and 1557 show that while Grana was present in the May meetings where wage increases were explained, she did not make any statements about wages, and spoke only about benefits and the formation of the EAR committee.

As noted above, Morales, as here pertinent, testified that he along with all of the drivers from the transportation department attended a meeting on May 6, 2001, with Largaespda and Grana at which Grana told the employees that (a) they were in the process of decertifying the Union, it no longer existed, and there would not be any more negotiations; (b) the Company had improved financially, it had more business, they were going to give salary increases; and (c) they were able to give an increase because the union issue was over.[72] In his affidavit to the Board (GC Exh. 35), Morales indicated as follows:

> In that meeting they told us that there was no more union in the kitchen because the employees had signed papers to throw out the Union. They told us that for that reason, they had given a raise to all the employees in the kitchen.

Largaespda did not testify at the trial herein so he did not deny that Grana made these statements. Grana did not unequivocally, specifically deny making these statements at this meeting. Additionally, Grana is not a credible witness. The testimony of Morales is credited. While Morales did not specifically testify that Grana used the word "reward," the test is an objective test and this, in effect, is what Grana said. The Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 9(c) of the consolidated complaint.

Paragraph 9(d) of the consolidated complaint alleges that Respondent, through Daysma Grana, at Respondent's facility on or about May 7, 2001, and on other dates in or around early May 2001 not more specifically known by the General Counsel, informed employees that it was replacing the Union with an "EAR" group to address employee grievances. Counsel for the General Counsel on brief contends that the Respondent sought to placate its bargaining unit employees by not only granting promised wage increases but also by forming an EAR committee created solely for the purpose of replacing the Union; that the record evidence reveals that during the deliberation process over retroactive wage increases, the Respondent proposed that this committee be reinstated for the purpose of addressing issues raised by bargaining unit employees; and that the Vidal, Grana, and Wilsher confirmed that the EAR committee was established to perform some of the functions previously performed by the Union before recognition was withdrawn. The Respondent on brief argues that Grana did not make any statements to employees which violated the Act.

As noted above, Morales, as here pertinent, testified that he along with all of the drivers from the transportation department attended a meeting on May 6, 2001, with Largaespda and Grana at which Grana told the employees that (a) they were in the process of decertifying the Union, it no longer existed, and given this condition, there would not be any more negotiations; (b) they were going to give salary increases; (c) since there was no intermediary like the Union, the Company was proposing to form a group, EAR, to be represented by an employee of each department to deal with the different issues that would come up either with respect to labor problems, wages, or any other problem; and (d) since decertification was in progress, the Company needed to form a committee of employees so that they could deal with the internal problems. Largaespda did not testify at the trial herein so he did not deny that Grana made these statements. Grana did not unequivocally, specifically deny making these statements at this meeting. Additionally, Grana is not a credible witness. The testimony of Morales is credited. He did not testify that either Vidal or Burgos were present at this meeting. While Morales did not testify that Grana specifically said "replacing," the test is an objective test, and this, in effect, is what Grana said. The Respondent violated Section 8(a)(1) of the Act on or about May 7, 2001, as alleged in paragraph 9(d) of the consolidated complaint.

Paragraph 9(e) of the consolidated complaint alleges that Respondent, through Daysma Grana, at Respondent's facility on or about July 25, 2001, threatened employees with discharge if they contacted the Union or the Board about disciplinary issues. This allegation refers to what Grana said to Hurtado during a meeting she had with him in July 2001. First, Hurtado testified that Grana said that she had to fire him for what he did whether he was going to speak to the Union or not, or whether he made allegations to the Labor Department. In my opinion this does not equate to a threat to discharge if the employee contacts the Union or the Board about the discipline. For the sake of argument, if one accepted Hurtado's testimony at face value, what Grana was saying was I am going to fire you, and whether you go to the Union or the Board does not change that. Second, for the reasons given below, Hurtado is not a credible witness. I do not believe that the "Labor Department" was mentioned during this meeting. As concluded above, Grana is not a credible witness. But Rosario was also present at this meeting. I credit his testimony that neither he nor Grana threatened Hurtado with termination if he went to the Union. This allegation of the complaint will be dismissed.

Paragraph 10(a) of the consolidated complaint alleges that Respondent, by Dario Mazier, at Respondent's facility in or around February, March or April 2001, on a date not more specifically known by the General Counsel, threatened employees that Respondent would withhold wage increases from them due

[72] Morales did not testify that Burgos or Vidal were present at this meeting.

to their support for the Union. Paragraph 4(b) of the complaint alleges that Mazier has been an agent of Respondent within the meaning of Section 2(13) of the Act. Counsel for the General Counsel on brief contends that the credible record evidence reveals that Mazier served as an agent of Respondent as he circulated the disaffection petition among unit employees; that Mazier engaged in this activity, notwithstanding the Respondent's no solicitation policy, during working hours on the work floor in the presence of upper-level management; that this activity came on the heels of his presence at the showing of the videotapes to the newly hired employees; that Mazier was rewarded for assisting in the circulation of the disaffection petition when he was given a retroactive pay increase on June 22, 2001; and that, as testified to by Adelstein, the Respondent accepted responsibility for a legal fee of over $2341 for Mazier. Counsel for the General Counsel points out that while she called Mazier on the first day of the trial herein to testify, he was not called by the Respondent to respond to the evidence of employee witnesses regarding his circulation of the disaffection petition. And she requests that an adverse inference be made that had Mazier testified about it, his testimony would have supported that of Morales, Solano, Noguera, Treto, Rodriguez, and Hurtado. The Respondent on brief argues that "Mazier, during examination by the General Counsel, vehemently denied soliciting signatures or engaging in any other conduct for or against the Union in 2001 (Tr. 76)[73]; that while counsel for the General Counsel established that Mazier has a supervisory title and salaried status, she introduced no evidence that Mazier has acted as a conduit for management's instructions or messages, or that he is perceived as a management's right-hand man, or that he gives orders to any employee or reprimands employees, schedules overtime, signs timecards, or grants time off, or that he uses a company truck, or attends management meetings; that the Company admits that it would be liable for Mazier's alleged conduct and/or statements if he has been 'held out as a conduit for transmitting information from management to other employees,' *Debber Electric,* 313 NLRB 1094, 1095 fn. 6 (1994); and that since Counsel for the General Counsel has not established that Mazier is an agent, she cannot establish that the Company violated the Act by any of Mazier's alleged actions.

With respect to the Respondent's argument on brief that "Mazier, during examination by the General Counsel, vehemently denied soliciting signatures or engaging in any other conduct for or against the Union in 2001 (Tr.76)," it is noted that on the cited page of the transcript Mazier gave the following testimony:

> Q. BY MS. PLASS: The question is, what are your sentiments; do you support the Union?
>
> . . . .
>
> THE WITNESS: I do not have anything against it, nor favor them.
>
> Q. BY MS. PLASS: Did you support the Union in the year 2001?
>
> A. It would be the same feeling for whatever year.
>
> Q. Which is what?

This is all the testimony that Mazier gave on page 76 of the transcript herein. On page 77 of the transcript Mazier gave the following testimony:

> A. I do not have any interest. I am not in favor nor against it.
>
> Q. Mr. Mazier, did you engage in any activities in the year 2001 regarding the Union?
>
> A. No.

By no stretch of the imagination would what appears on page 76 of the transcript amount to a vehement denial of soliciting signatures or engaging in any other conduct for or against the Union in 2001. Even when one considers page 77 of the transcript, it still does not amount to a vehement denial of soliciting signatures on a disaffection petition or engaging in other conduct against the Union in 2001. Mazier was called as a witness the first day of the trial herein by counsel for the General Counsel. His testimony as General Counsel's witness is set forth at pages 64 to 81 of the transcript herein. This trial, as noted above, lasted 14 days. There are 1847 pages of transcript. As noted by counsel for the General Counsel, the Respondent did not call Mazier as a witness to respond to all of the evidence about his activities.[74] In view of this, his testimony, that he did not engage in any activities in the year 2001 regarding the Union, when called by counsel for the General Counsel serves only to demonstrate his willingness to be untruthful.

In *Pan-Oston Co.,* 336 NLRB 305, 305–306 (2001), the Board indicated as follows:

> The Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. *Cooper Industries,* 328 NLRB 145 (1999); *Hausner Hard Chrome of KY, Inc.,* 326 NLRB at 428. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.,* 315 NLRB 725 (1994) (and cases cited therein). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82 (1988) (citing Restatement 2d. Agency, . . . [subsection] 27 (1958, Comment a)).
>
> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World,* 286 NLRB at 426–427 (and cases cited therein). The

[73] R. Br. 18.

[74] One of the Respondent's attorneys asked Mazier only four questions, all dealing solely with the work he performs, when he was called by counsel for the General Counsel. The attorney then indicated as follows:

> MR. SECARAS: Your Honor, I do not have any further questions of Mr. Mazier at this time, but we may call him as part of our case in chief as well.

Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules v. Lane*, 262 NLRB 118, 119 (1982).

The Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee. For example, in *Hausner Hard-Chrome of KY, Inc.*, supra, the Board found that the heads of various departments who regularly communicated management's production priorities to employees acted as agents of the employer when they told employees that the employer would likely shut down the plant if employees voted in favor of a union.

In contrast, the Board may decline to find agency where an employee acts outside the scope of his or her usual duties. Thus, in *Waterbed World*, supra, the Board found that an employee who interrogated other employees and threatened them with discharge did not act as an agent of the employer because the employer had never held out the employee as being privy to management decisions or as speaking on its behalf.

Although not dispositive, the Board will consider whether the statements or actions of an alleged employee agent were consistent with statements or actions of the employer. The board has found that such consistencies support a finding of apparent authority. For example, in *Hausner Hard-Chrome*, discussed above, the Board found that the "manifestation of apparent authority was strengthened" because the statements made by the department heads were consistent with statements made by management. 326 NLRB at 428. See also *Great American Products*, 312 NLRB 962 (1993).

We emphasize that an employee may be an agent of the employer for one purpose but not another. For example, in Cooper Industries, supra, the Board found that employees could reasonably believe that employee facilitators who made various coercive statements acted as agents of the employer because the employer had held them out as primary conduits for communication with management. However, the Board found that employees would not reasonably believe that a facilitator who attended a union meeting acted as an agent of the employer for purposes of surveillance where the union representative had questioned the facilitator, accepted his explanation that he was there as a regular worker, and permitted him to remain. 328 NLRB 145, 146.

Finally it is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency relationship. *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994). As discussed above, the party who had the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful.

Applying these principals here, I find that counsel for the General Counsel, who bears the burden of proof, has established that the Respondent did take those actions from which employees could reasonably conclude that Mazier was acting on the Respondent's behalf when he engaged in the specific conduct found to be unlawful below. Mazier conveyed an anti-union message at at least one orientation meeting. Since maintenance employees were specifically excluded from the unit, even if he was only an employee, he would not have had any interest in opposing the union since it would not have had any effect on him as an employee. When Mazier spoke to the employees during orientation he was speaking as part of a group of company representatives. He was not speaking as an employee. He espoused the company position, he—as conceded by the Respondent on brief—has a supervisory title and he is salaried as opposed to receiving an hourly wage. Additionally, Mazier, unlike production employees, does not punch a timeclock, he cannot receive overtime pay, and he wears a badge that reads "Maintenance Manager." Since Mazier was not called by the Respondent to specifically deny the testimony of Morales, Solano, Noguera, Rodriguez, and Treto, the testimony of these witnesses is credited. Hurtado is not a credible witness. His testimony regarding Mazier is not credited even though Mazier did not specifically deny it. Consequently, in addition to all of the above, we have Mazier approaching employees in work areas while they are working, soliciting signatures on the disaffection petition for days. While drivers, coordinators and some supervisors need badges for the airport, production workers do not. Mazier did not have any excuse to be approaching production workers in work areas while they were working to get them to sign something. The fact that he was able to do this in and of itself had to convey the understanding to employees that he was acting on behalf of management. While, in my opinion, counsel for the General Counsel has established that Mazier was acting as an agent of the Respondent in soliciting signatures on the disaffection petition, she did not introduce any evidence demonstrating that Mazier threatened employees that the Respondent would withhold wage increases from them due to their support for the Union. This portion of the complaint will be dismissed.

Paragraph 10(b) of the consolidated complaint alleges that Respondent, by Dario Mazier, at Respondent's facility on or about April 13, 2001, and in or around mid-April 2001, on dates not more specifically known by the General Counsel, solicited employee support of a petition to decertify the Union. As indicated above, counsel for the General Counsel on brief contends that Mazier was acting as an agent of the Respondent when he solicited signatures on the disaffection petition. Also, as indicated above, the Respondent on brief argues that Mazier is not an agent of the Respondent and he denies engaging in any activities in 2001 regarding the Union. Mazier was not a credible witness. The fact that an agent of the Respondent, Mazier, was soliciting signatures on a disaffection petition had to have a coercive effect on employees. While some of the more experienced employees refused to sign Mazier's disaffection petition, they did so with the understanding that if there was any question as to whether they supported the Union up to that point in time, management now knew exactly where they stood when they refused to sign the petition. With its agent Mazier soliciting signatures on a disaffection petition, management was determining who supported the Union and who supported the Company. The Respondent violated Section

8(a)(1) of the Act as alleged in paragraph 10(b) of the consolidated complaint.

Paragraph 10(c) of the consolidated complaint alleges that Respondent, by Dario Mazier, at Respondent's facility on or about April 13, 2001, and on another date in or around April 2001 not more specifically known by the General Counsel, promised employees wage increases and other benefits if they decertified the Union. The only witness testifying in support of this allegation is Hurtado. I do not find Hurtado to be a credible witness. Consequently, notwithstanding the fact that Mazier did not specifically deny Hurtado's testimony, this allegation of the complaint will be dismissed.

Paragraph 11(a) of the consolidated complaint alleges that Respondent, by Angel Sanchez, at Respondent's facility on or about February 14, 2001, threatened employees with loss of business opportunities due to their support for the Union. Counsel for the General Counsel on brief contends that Sanchez was acting on behalf of the Respondent when conducting orientation training; that Sanchez possess the requisite 2(11) supervisory indicia; that according to Wilshire, Sanchez was a salaried employee identified on the payroll register as management personnel in payroll period 9 for the pay period ending May 4, 2001; that Vidal testified that Sanchez and other managers report directly to him; that Grana testified that Sanchez has an office where he maintains all videotapes pertaining to drivers as well as airport certifications for drivers; that as Treto testified, Sanchez has the authority to assign flights to the transportation employees, including himself, and Sanchez did tell him and other employees that if they did not follow company policies and procedures they will be dismissed; that Sanchez received a $1330 bonus after showing the antiunion videos to the new drivers who were "brainwashed so that Respondent could attain a majority of employees who were too frightened to support the Union" (counsel for GC Br. 44); that Sanchez' testimony also lacks credibility due to the lack of candor exhibited when responding to certain questions about the antiunion videotape, especially when he claimed to have no recollection of the content of the antiunion videotape when asked what on it would cause employees who viewed it to approach him and tell him that they regretted signing union authorization cards; and that Sanchez made an unlawful statement to employees when he emphasized that the Union would only accomplish obstructing incoming business from new customers. The Respondent, on brief argues that although Sanchez was a salaried employee, his job duties were just like those of other hourly maintenance mechanics in 2001; that while Hector Fernandez testified that he believed Sanchez to be a supervisor, he never observed Sanchez exercise any supervisory authority, and he never witnessed Sanchez discipline an employee; that while Treto testified that Sanchez is a supervisor who tells the drivers to take a certain truck for a certain flight, which employee is responsible for a certain flight is decided by the schedule set up by Nunez and Largespada; that Treto testified that Toledo is in charge of operations when Largespada is out; that the General Counsel failed to establish that Sanchez engaged in any activities evidencing supervisory authority; that while General Counsel's Exhibit 11 shows that Sanchez was involved in the issuance of a verbal warning for one employee on one occasion in May 2001, the evidence demonstrates that Sanchez did not exercise any independent judgment in the issuance of this warning; that the one time issuance of a verbal reprimand is insufficient to establish supervisory status under the Act, *Vanport Sand & Gravel, Inc.*, 267 NLRB 844 (1983); and that Sanchez was excluded from the bargaining unit because he holds the position of mechanic, a classification that was specifically excluded from the unit by agreement of the parties.

It has not been demonstrated that Sanchez exercised independent discretion on any regular basis or to any significant degree. The assignment of drivers is based on a schedule worked up by Nunez and Largespada. Sanchez does not grant time off. When Largespada is absent, Toledo is in charge. Sanchez has none of the other indicia of supervisory responsibility set forth in Section 2(11) of the Act in that he does not hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline.[75] But the complaint also alleges that Sanchez acted as an agent of the Respondent. In applying the principals set forth above, in my opinion counsel for the General Counsel has demonstrated that the Respondent has taken action from which employees could reasonably conclude that Sanchez was acting on Respondent's behalf when he engaged in the specific conduct alleged in this paragraph to be unlawful. Sanchez conveyed an antiunion message at orientation meetings. The Respondent argues that mechanics were excluded from the unit apparently since they are considered maintenance employees. Since maintenance employees were specifically excluded from the unit, if Sanchez was only an employee he would not have had a personal interest in opposing the union since it would not have had any effect on him as an employee. When Sanchez spoke to the employees he was speaking either as part of a group of company representatives or he was acting as a conduit between management and the employees. Sanchez was not speaking as an employee. He espoused the company position, and he—as conceded by the Respondent on brief—is salaried as opposed to receiving an hourly wage. Additionally, he does not punch a timeclock and he has an office. Sanchez is not a credible witness. The testimony of Treto is credited. Sanchez made the same statement as Grana, which is treated in paragraph 9(a) above. And for the reason specified above, that statement violates the Act. The Respondent violated Section 8(a)(1) of the Act as specified in paragraph 11(a) of the consolidated complaint.

Paragraph 11(b) of the consolidated complaint alleges that Respondent, by Angel Sanchez, at Respondent's facility in or around February, March, or April 2001, on a date not more specifically known by the General Counsel, threatened to withhold wage increases due to employees' support for the Union. Treto's testimony is credited. Sanchez is not a credible witness. As noted in 9(b) above, in my opinion counsel for the General Counsel's interpretation is correct. The Respondent violated Section 8(a)(1) of the Act in May 2001 by threatening, as here

[75] Sanchez did not exercise independent judgment in the one instance where he gave an employee a verbal warning since he was merely acting as a conduit between management and the involved employee. GC Exh. 11.

pertinent, through Sanchez, to withhold wage increases due to employees' support for the Union.

Paragraph 12 of the consolidated complaint alleges that in or around late March 2001, on a date not more specifically known by the General Counsel, Respondent, by Victor Vidal, at Respondent's facility, told employees that the Union was decertified and no longer represented them. Counsel for the General Counsel on brief contends that informing employees of the withdrawal of recognition and that the Union is no longer their representative constitutes violations of Section 8(a)(1) of the Act. The Respondent on brief argues as follows: "Noguera testified that sometime around late March [2001], Vidal approached him and three other employees on the dock while they were loading trucks for the Northwest account and told them that the Union had been decertified (Tr. 247)." (R. Br. 20.) No such testimony was given on transcript page 247. And on page 248 of the transcript where Noguera testifies about this conversation he does not specify that he was loading trucks for the Northwest account. The Northwest account did not come up until cross-examination by Zdravecky. And on redirect, Noguera testified that at the time of this statement he was loading trucks for Jamaican Airline and Falcon Airline. The Respondent argues on brief, signed by Zdravecky, that "[a]s this conversation likely occurred after the withdrawal of recognition in April 2001, it could not have been unlawful and could not have solicited employees to decertify the Union when the Union no longer represented the employees at that time." (R. Br. 20.) As noted above, Vidal testified that he did not tell Noguera or any other employee in March 2001 that the Union had been decertified, or tell employees this in the first month of his employment (February 16 to March 16, 2001), or tell employees this prior to the meetings where he and Grana told employees that the Company no longer recognized the Union. For decertification to occur, a valid petition must be filed with the Board. No Board order decertifying the Union was made a matter of record herein. Indeed, no indication was made on the record that a decertification petition had been filed with the Board in this matter. In my opinion Noguera was mistaken on the timing, and Vidal said something about withdrawal of recognition after April 18, 2001.[76] The Respondent on brief argues that Vidal "categorically . . . denied that he ever used the word 'decertification' in any meetings with employees, including meetings held after the Company's lawful withdrawal of recognition (Tr. 904)"; and that even if Noguera's testimony is credited, Vidal's statement does not violate the Act as it cannot be construed as tending to coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. When the statement was made the Union, notwithstanding the Respondent's machinations, continued to be, as a matter of law, the certified collective-bargaining representative of the employees in the unit. For the general manager of the Respondent to be telling unit employees to their face that the Union could no longer represent them interfered with and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act. The Respondent was not only unlawfully withdrawing recognition but it, in effect, was telling employees in person that, contrary to Section 7 of the Act, unit employees did not have the right to self-organization, to form, join or assist a labor organization, or to bargain collectively through a representative of their own choosing. The Respondent by informing employees of the unlawful withdrawal of recognition and saying to employees that the Union was no longer their representative violated Section 8(a)(1) of the Act.

Paragraph 13 of the consolidated complaint alleges that on or about March 28, 2001, Respondent, by Monica Wilshire, at a negotiation session, interrogated employees about their union membership, activities and sympathies. Counsel for the General Counsel on brief contends that it is not contested that Wilsher questioned Solano about having a change of heart; that this constitutes unlawful interrogation inasmuch as Wilsher, an upper level manager, questioned Solano about the reason for his change of sentiment and then implicitly threatened to fire him; and that, therefore, the interrogation by Wilsher violated Section 8(a)(1) of the Act. The Respondent on brief argues that no evidence was introduced to establish, as alleged in the complaint, that Wilshire, at a negotiation session, interrogated employees about their union membership, activities and sympathies; that since the conversation between Wilsher and Solano occurred in the hallway, he was free to walk away; that under the totality of circumstances test, the interrogation would reasonably tend to restrain, coerce, or interfere with rights guaranteed by the Act if it was accompanied by a specific threat or promise, *Emery Worldwide*, 309 NLRB 185 (1992); that it is not clear that Wilsher made any specific threats regarding Solano's union activity; that counsel for the General Counsel failed to establish that the tone, duration or setting of Wilsher's inquiry was coercive; that Wilsher's inquiry was not repeated; that since Solano attended a bargaining session on the Union's behalf, he made it known that he was a union supporter, and since he was a known union supporter, the likelihood of the coercive effect of the questioning was lessened; and that based on the totality of these circumstances, the General Counsel cannot establish that Wilsher's conduct violated Section 8(a)(1) of the Act.

As noted above, Solano testified that while at work, Wilsher (a) asked him why, after helping the Company, he was now against the Company and he was helping the Union; (b) said in the presence of other dishwashers that if the Company fired him, he would see if the Union would help him find another job; and (c) was very upset and she said in a strong tone of voice that he was an ungrateful person. Solano impressed me as being a credible witness. Wilsher was less than candid about Carlos Respuro. I credit the testimony of Solano with respect to this conversation. The Board, in *Emery Worldwide*, supra at 186, concluded as follows:

> Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under

[76] To the extent that it might be argued that Vidal's denial is not being credited, it should be noted that there is a difference in the timing and the exact wording. Also, as pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (1950):

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

> all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

In my opinion Wilsher's questioning of Solano violated Section 8(a)(1) of the Act in that it was coercive in nature. The conversation did not occur in a context free of other unfair labor practices. As set forth herein there were numerous unfair labor practices. The nature of the questioning was threatening. In a strong tone of voice in front of other employees Wilsher told Solano that he was an ungrateful person and if the Company fired him, he would see if the Union would help him find another job. This conversation was not casual or amicable, and it was accompanied by a coercive statement made by a high-level manager, Wilsher, who is the controller of the Respondent in Miami. The fact that Solano had just made his support for the Union known by serving on the bargaining committee would not lessen the coercive nature of Wilsher's inquiry. After this conversation, Solano had to wonder if he was going to be fired. The Respondent violated Section 8(a)(1) of the Act by Wilsher's unlawful interrogation of Solano.

Paragraph 14(a) of the consolidated complaint alleges that on or about April 18, 2001, Respondent withdrew recognition of the Union as the exclusive collective-bargaining representative of the unit. Counsel for the General Counsel on brief contends that the Respondent directed its agents to solicit employee support for a petition to decertify the Union; that the Respondent acted at its peril by hastily processing a disaffection petition that was secured with the assistance from designated agents; that the Respondent unlawfully withdrew recognition from the Union because of its reliance on the disaffection petition that is laden with defects; that the record evidence reveals that Grana erroneously counted a number of individuals who should not have been counted in determining the number of unit members who signed the disaffection petition; that many documents produced pursuant to subpoena that Grana testified were relied on to verify the signatures on the disaffection petition are dated after recognition was withdrawn; that no attempt was made by the Respondent to correct this situation; that Grana could not locate any documentation in the documents turned over to counsel for the General Counsel to verify some of signatures; that the general standard for determining the legitimacy of a withdrawal of recognition requires an employer who withdraws recognition from an incumbent union to prove that the union had, in fact, lost majority status at the time of the withdrawal, *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001); that any determination as to the validity of the signatures on the disaffection petition should be guided by the principles set forth in *NLRB v. Gissel Packing Co*, 395 U.S. 575 (1969), because in these circumstances, establishing proof of actual loss of majority support is akin to situations where a union seeks to prove its majority statue; that actual loss requires a showing of an actual numerical loss of a union's majority support at the time of withdrawing recognition; that it is obvious that the process of authenticating signatures extended over a period of several months inasmuch as Respondent relied on business records dated after recognition was withdrawn for specified individuals; that on April 18 there were 146 employees in the unit, there were 96 names on the disaffection petition (including a total of 24 on two pages which have no heading), and a total of at least 50 names on the petition should be disregarded for issues regarding either eligibility, authentication, language, and duplication; that the Respondent is required to present untainted, valid evidence that a numerical majority of unit employees no longer desires representation by the Union; and that here the evidence reveals that Respondent has failed to meet its burden.

The Respondent at page 28 of its brief argues as follows:

> On or about April 17, the Company received a disaffection petition signed by the majority of bargaining unit employees (Tr.1219–1220; R. Exh. 38). ***AFTER*** verifying the signatures on that petition and confirming that it was supported by a majority of bargaining unit employees, the Company lawfully withdrew recognition from the Union on April 18 [Tr. 1220–1221: GC Exh. 26]. [Emphasis added.]

At pages 36 and 37 of its brief, the Respondent further argues as follows:

> Next, Grana turned to the task of verifying signatures. She went to each employees' personnel file and compared the signature on the petition to a signature in the employees[']' personnel file [Tr. 1651, 1656–1657]. . . .
>
> ***AFTER*** confirming that the 85 remaining signatures on the petition were authentic, she [Grana] prepared a coversheet [sic] with her numerical analysis and faxed that, along with the six pages of the petition containing signatures, to Zdravecky [Tr. 1522, 1529–1532, 1534; R. Exh. 39]. [Emphasis added.]

At pages 54 of its brief, the Respondent further argues as follows:

> Thus, although the Board recently instructed in *Levitz* . . ., 333 NLRB No. 105 [717] (2001), that the burden rests with the employer to demonstrate that at the time of a withdrawal of recognition a majority of bargaining unit employees did not desire to be represented by the incumbent labor organization, the General Counsel must make this averment specifically in the complaint and present some evidence that the employer's contention of the union's loss of majority support lacks credence. Otherwise, the General Counsel cannot even proceed to the question of taint. *Buntiing Bearings Corp.*, 2002 NLRB LEXIS 268 (ALJ Amchan, July 5, 2002) relying on *Levitz* . . ., supra.

At pages 55 and 56 of its brief, the Respondent further argues as follows:

> Furthermore, NLRB General Counsel, Arthur F. Roseneld, issued GC Memorandum 02-01 on October 21, 2001 to provide "guidance on how Regions should investigate" charges alleging unlawful withdrawal of recognition in light of *Levitz* . . . . Therein, Regions are advised that "[a]n employer sustains its initial burden of proof of establishing 'actual loss' if it presents untainted, valid evidence, such as a petition, that establishes that a numerical majority of unit employees no longer

> desires representation from the incumbent union." [GC Memorandum 02-01, p. 2.]

The portion of the memorandum, which was actually issued on October 22, 2001, quoted above by the Respondent reads as follows:

> An employer sustains its initial burden of proof of establishing 'actual loss' if it presents untainted valid evidence, such as a petition, that establishes that a numerical majority of unit employees no longer desires representation from the incumbent union.[13]

[13]. In order to be valid, such a petition must contain the signatures of a majority of employees employed in the unit at the time of the withdrawal of recognition, and the employer must demonstrate that those signatures are facially authentic, usually by comparing them with employee signatures contained in the employer's business records or by witness authentication. See, e.g., *NLRB Casehandling Manual* (Part One) ULP, Sec. 10058.1

Understandably the Respondent left out this revealing footnote from its quotation and Zdravecky did not indicate "[Footnote omitted.]" which is the accepted practice in such a situation. It is noted that Memorandum GC 02-01, which the Respondent cites, was issued almost 5 months before the commencement of the trial herein.[77] Indeed, the Respondent cites "*NLRB General Counsel Memorandum* 02-01, p. 3 (October 22, 2001) on page 6 of its March 9, 2002 "EMPLOYER'S RESPONSE TO PETITIONER'S PETITION TO REVOKE THE SUBPOENA DUCES TECUM," which was filed with the Board's Division of Judges in Atlanta, Georgia, on March 11, 2002.[78]

And at page 87 of its brief the Respondent further argues as follows:

> The undisputed evidence further demonstrates that, prior to the hearing [in other words over a year *after* attorney Zdravecky withdrew recognition] Wilsher confirmed Grana's conclusion by using Payroll Register No. 9, the payroll register that actually covered April 18, but which was unavailable to Grana at the time of her calculation, and confirmed that there were 164 active bargaining unit employees as of April 18, and that 84 bargaining unit employees had signed the petition.[73]

[73] The fact that Wilsher performed this analysis after the Company's withdrawal of recognition is inconsequential under *Levitz* . . . . Rather, *Levitz* . . . merely states that an employer must establish objective evidence of a desire of a majority of the bargaining unit employees on the date the company withdrew recognition from the union to proceed with that withdrawal. The fact that the Company confirmed that it had such support after the withdrawal of recognition is not fatal to its position as long as it has demonstrated an actual numerical majority.

Forgetting for the moment the almost total lack of evidence regarding what any of the signers read or did not read on the petition, or what they were or were not told about the purpose of the petition before they signed it, has the Respondent proven, as it alleges above, that "84 bargaining unit employees had signed the petition?" Although the burden of proof is on the Respondent with regard to showing that the disaffection petition was actually signed by bargaining unit members, the Respondent itself never made this preliminary showing either with witnesses or documents.[79] The Respondent did not call even one of the signers to authenticate his or her signature. As noted above, the one employee witness the Respondent did call for another purpose, Damaris Fernandez, testified on cross-examination by counsel for the General Counsel—over the objection of Respondent's counsel, Zdravecky—that no one approached her about the Union in April 2001; that no one approached her with a piece of paper to sign regarding the Union; that she never signed a piece of paper; that she did not recall anyone approaching her in 2001 about the Union and asking her to sign anything; and that she did not remember signing a piece of paper with lines on it. Notwithstanding being faced with evidence during its case in chief that at least one of the signatures on the disaffection petition, Demaris Fernandez', was possibly a forgery, the Respondent still did not call any of the employees to authenticate their signatures. Why not? And when faced with testimony that Supervisor Toledo, in soliciting an employee's signature, told employee del Toro that a blank piece of paper, except for one other signature, that he wanted del Toro to sign was only to get a $2 raise for the drivers since

[77] As noted above, the GC Memorandum refers to the Board's Casehandling Manual. The section cited refers to using union authorization cards to prove that a majority of the employees supported a union, the converse of the situation at hand. In his memorandum, General Counsel indicated that the method used to evaluate the authenticity of signatures would parallel the methods used to evaluate the authenticity of union authorization cards when seeking a *NLRB v. Gissel Packing Co,* 395 U.S. 575 (1969), remedy. Sec. 10058 of the above-described Casehandling Manual reads as follows:

> Authorization Cards: In all proceedings before the Board, only evidence that the General Counsel has reason to believe is true and authentic is offered.
>
> It is mandatory upon the Regions to establish the authenticity of authorization cards before issuance of complaint. . . . .

And Sec. 10058.1 reads as follows:

> Investigating Authenticity: The means of carrying the burden of proving the authenticity of authorization cards will vary from case to case. In certain cases it may be necessary to have signers authenticate their cards as to execution and purpose, while in other situations the credited testimony of the solicitor or witnesses will suffice. Where, despite diligent effort the Region cannot locate or make available card signers or qualified witnesses, it may be necessary to use expert testimony to establish the validity of the cards. Whatever the method, it is incumbent on the Region in every case to make whatever investigation is reasonably required to insure the validity of the cards that it intends to submit as evidence in support of the General Counsel's case.

The Casehandling Manual is in the public domain. All the Respondent's attorneys had to do was to reverse roles. In other words, the Respondent's attorneys should have done what the General Counsel would do in a *Gissel,* supra, situation, which is explained in the next preceding paragraph. The General Counsel does not have the burden of proof regarding the disaffection petition.

[78] The pleading is hereby received as ALJ Exh. 1 and it will be placed in the record with the formal papers.

[79] As noted above, counsel for the General Counsel on cross-examination of Grana introduced a number of documents which had employee signatures.

the Union was not in the Company any longer, the Respondent did not call Toledo on surrebuttal to refute this testimony. Why not? The Respondent is arguing that Toledo is a member of the unit. Additionally, as noted above, the Respondent cited Memorandum GC 02-01 to me even before the trial herein began. If the Respondent's attorneys had any questions about the requirements of *Levitz*, supra, what they were required to show, as set forth above, was laid out in Memorandum GC 02-01. Why didn't the Respondent's attorneys comply with the obvious and reasonable requirements to meet the Respondent's burden of proof. Why didn't the Respondent's attorney's make any effort on their own (other that asking questions about some documents that counsel for the General Counsel introduced during her cross-examination of their witness) to introduce evidence to prove the authenticity of the signatures?

Almost 50 years ago the following appeared in the opinion written by Justice Frankfurter in *Brooks v. NLRB*, 348 U.S. 96, 99–100 (1954):[80]

> Since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting— in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth.

How far have we come, and in what direction have we traveled in these almost 50 years if the disaffection petition introduced by the Respondent herein, under the circumstances of this case, is accepted as proof by the Respondent that on April 18, 2001, the Union had actually lost the support of the majority of the bargaining unit employees?

Both Grana on her direct testimony and the Respondent on brief try to convey the impression that Grana verified or authenticated the signatures before she faxed her analysis to Zdravecky on April 18, 2001. Grana subsequently changed her testimony when she admitted that she had not authenticated the signatures when she faxed her analysis to Zdravecky on April 18, 2001, which analysis Zdravecky ostensibly relied on when she withdrew recognition on April 18, 2001. Zdravecky on brief perpetuates the falsehood notwithstanding the fact that Grana recanted her testimony that she verified or authenticated the signatures before she faxed her analysis to Zdravecky on April 18, 2001. If Zdravecky had told Grana to verify or authenticate the signatures on April 18, 2001, before she forwarded the analysis that Zdravecky ostensibly was going to rely on, then obviously Grana would have done it or would have explained to Zdravecky that she needed more time to complete this important task before recognition was withdrawn. Grana did neither. Zdravecky never asked Grana to verify or authenticate the signatures before Zdravecky withdrew recognition. If one believes Grana's revised testimony, Zdravecky withdrew recognition without Grana verifying or authenticating the signatures. If that is so, why was there any need for Grana to subsequently verify or authenticate the signatures? Grana was not a credible witness. Counsel for the General Counsel expresses the opinion on brief that contrary to Grana's revised testimony, it took longer than a week for Grana to verify or authenticate the signatures because some of the documents which were turned over to counsel for the General Counsel pursuant to her subpoena were dated after April 25, 2001 (the 1-week later according to Grana's testimony). Again Grana was not a credible witness. She lied under oath about a number of material facts. In my opinion Zdravecky never asked Grana to verify or authenticate the signatures and Grana never did. That is why, although she testified that she read the subpoena, Grana was not concerned with what documents were given to counsel for the General Counsel with respect to documents which allegedly were used to verify or authenticate signatures. And that is why the Respondent's attorneys did not oversee what documents were turned over in response to paragraph 15 of the subpoena (GC Exh. 41). Although Grana changed her testimony about when she verified or authenticated the signatures and she admitted that there was no documentation memorializing her communicating this information to Zdravecky, the Respondent never subsequently attempted to put on evidence through either Grana or Zdravecky as to exactly when and how this information was communicated. The Respondent never verified or authenticated the signatures. The Respondent did not care. And attorney Zdravecky did not care.

It is hard to imagine a situation more illustrative of the need for a Board conducted vote. Here we have, according to Grana, some unknown person or persons, during her overnight absence from her office, sliding an envelope containing the disaffection petition under her locked office door. But according to Vidal, Grana told him who gave her the petition but he just could not remember who it was. How could Grana tell him who gave her the petition if she did not know who it was? And Burgos also adds to this mix in that he testifies that when Grana called him to tell him about the petition she said that "an *employee* came in, *gave* her the petition." (Emphasis added.) Who do we believe? Then with respect to what did she do with the petition, Grana testifies on direct that she "immediately" telephoned Burgos. But during cross-examination Grana testifies that she waited an hour to 1-1/2 hours to call Burgos in Chicago because of the time difference. Burgos, however, testified that he was on the West Coast when Grana telephoned him about the petition. This would mean that Grana's change in her testimony to accommodate the time difference between Miami and Chicago was not not enough in view of the fact that the time difference on the West Coast is greater. This makes one wonder (1) whether Grana knew exactly who gave her the petition but it was decided that it would be better to cloak the delivery in mystery to avoid having to answer questions about this step of the procedure; and (2) whether there ever was a phone call to Burgos to tell him about the petition or whether all of the principals knew exactly what was going on all along, and the telephone call story described by Grana and Burgos was concocted to give the procedure an air of legitimacy and at the same time give Burgos the ability to deny the he knew anything about the

[80] It is noted that *Brooks v. NLRB*, supra, dealt with a certification year situation. The quoted language should apply, in my opinion, equally to situations which occur both in and beyond the certification year.

petition. Grana knew exactly who gave her the disaffection petition. There was no phone call from Grana to Burgos telling him about the disaffection petition. Burgos already knew about the petition. Grana did not have to tell him. Both Grana and Burgos were not credible witnesses.

As noted above, the Respondent on brief argues that Judge Amchan concluded in *Bunting Bearings Corp.*, supra, relying on *Levitz*, supra, that the General Counsel must aver specifically in the complaint and present some evidence that the employer's contention of the union's loss of majority support lacks credence before even being allowed to proceed to the question of taint. First, since Judge Amchan's decision was issued July 5, 2002, the Respondent could not have been relying on it for the trial of the matter at hand. Second, Judge Amchan did not reach the conclusion which the Respondent argues that he did. Judge Amchan, as here pertinent, concluded as follows:

> In *Levitz*, . . . [supra,] the Board held that an Employer must show an actual loss of support by a majority of bargaining unit members to withdraw recognition from an incumbent union. It cannot withdraw recognition and refuse to bargain with an incumbent union merely on the basis of a good-faith doubt regarding the union's majority support. In the instant case, there is no dispute that Bunting has established that the Union lost the support of a majority of unit members by May 29. However there remains the issue of whether the May 29 employee petition was tainted by Respondent's prior unremedied unfair labor practices. *Vincent Industrial Plastics*, 328 NLRB No. 40 [300] (1999). If so, Bunting would have violated Section 8(a)(5) and (1) in relying on this petition in refusing to bargain with the Union.

Bunting Bearings Corp., supra, does not support the argument made by the Respondent. Indeed, Respondent does not cite any authority that supports its argument that the General Counsel must specifically aver in the complaint that Flying Food lacked objective evidence that a majority of its bargaining unit employees no longer desired to be represented by the Union and unless the General Counsel does, she waives any challenge to, and acquiesces to the Company's contention that it has objective evidence that a majority of the bargaining unit employees had expressed a desire to be rid of the Union.[81] As a practical matter, since the petition was not filed with the Board as a petition for decertification, counsel for the General Counsel did not see the petition and any documents that the Respondent might have relied on to authenticate signatures until the Respondent complied on the first day of the trial herein with counsel for the General Counsel's subpoena request for "the disaffection petition and any other documentation relied upon as a basis for Respondent's withdrawal of recognition of the Union." Paragraph 15 of General Counsel's Exhibit 41. Even then the Respondent did not supply, for some of the signatures on the petition, documents which would allow counsel for the General Counsel to make a comparison with the signatures on the petition. And even after this was brought to the Respondent's attention, it did not remedy the situation. Also some of the documents postdated the time during which Grana testified that she verified the signatures and the Respondent did nothing to remedy this situation either. What the Respondent is attempting to do is shift the burden to the counsel for the General Counsel. In other words, instead of having the Respondent prove the validity of the petition, the Respondent is taking the position that the counsel for the General Counsel must disprove the validity of the petition in advance of having the documents to do so.[82] The burden of proof with respect to the validity of the disaffection petition, with respect to the authenticity of the signatures on the petition, is on the Respondent and no one else.

As the Board pointed out in *Levitz*, supra, which was issued on March 29, 2001:

> After careful consideration, we have concluded that there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning the union's majority status. We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* [*Corp.*, 95 NLRB 664 (1951),] and its progeny insofar as they permit withdrawal on the basis of good faith doubt. Under our new standard, an employer can defeat a post-withdrawal refusal to bargain allegation if it shows as a defense, the union's actual loss of majority status. [333 NLRB 717].
>
> . . . .
>
> We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).[49]

The Respondent has the burden of proof to show actual loss of majority support by the union at the time the Respondent with-

[81] The Respondent in making this argument asserted that it was "coupled with the focus of the General Counsel's case-in-chief to establish unlawful taint . . . ." (R. Br. 54.) As can be seen above, a great deal of counsel for the General Counsel's focus was on the fact that Respondent did not have objective evidence of the Union's loss of majority support. The burden of proof on the issue of loss of majority support rests on the Respondent and not on the General Counsel.

[49] An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence. If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority support by a preponderance of all the evidence.

[82] Certainly it is realized by the Respondent's attorneys that to make a good-faith averment one should be in a position to prove the averment.

drew recognition. Here the Respondent is relying on a disaffection petition to meet its burden. The Respondent, therefore, has the burden of proving that the disaffection petition is valid. As noted above, footnote 13 in Memorandum GC 02-01, which the Respondent cited in a pleading before the trial herein began, lays out what must be done. It bears repeating. It reads as follows:

> [13] In order to be valid, such a petition must contain the signatures of a majority of employees employed in the unit at the time of the withdrawal of recognition, and the employer must demonstrate that those signatures are facially authentic, usually by comparing them with employee signatures contained in the employer's business records or by witness authentication. See, e.g., *NLRB Casehandling Manual* (Part One) ULP, Sec. 10058.1

The Respondent did not meet its burden of proof. The Respondent did not prove the validity of the disaffection petition and, therefore, the Respondent did not show actual loss of majority support by the union at the time the Respondent withdrew recognition.[83] The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union as the exclusive bargaining representative of the unit.

While, in my opinion, it is not necessary to go into the question of whether the petition was tainted, there is a great deal of this type of evidence on the record, and in view of the egregious nature of the conduct, I believe that findings should be made with respect to it. If the Respondent had proven that the petition was valid, which the Respondent did not do, I would find that it was tainted by (1) the Respondent (a) unlawfully failing and refusing to provide a wage proposal to the Union; (b) showing antiunion videos, especially during the certification year, soliciting employees to decertify the Union; (c) threatening employees with loss of business opportunities due to their support for the Union; (d) having its agent Mazier solicit employee support of a petition to decertify the Union[84]; and (e) coercively interrogating an employee about his union membership, activities, and sympathies in the presence of other employees, (2) the fact that two of the pages of the disaffection petition had no heading, one of the employees who signed one of the pages which had no heading testified was misled as to the purpose of the document, and notwithstanding this, the Respondent did not call the other people who signed these pages to testify as to what they were told regarding the purpose of the document, and (3) there is evidence of record of the possible forgery of one of the signatures in the petition.[85] I conclude that counsel for the General Counsel has established a causal relationship between the unlawful conduct of the Respondent and its agents and any expression of disaffection with the incumbent Union.

Paragraph 14(b) of the consolidated complaint alleges that since on or about April 18, 2001, Respondent has failed and refused to meet and bargain with the Union upon request. Counsel for the General Counsel on brief contends that the Respondent acted unlawfully and at its peril when it withdrew recognition on April 18, 2001, and its failure and refusal to meet and bargain with the Union upon request after April 18, 2001, was unlawful. I agree. The Respondent violated Section 8(a)(5) and (1) of the Act as alleged in paragraph 14(b) of the consolidated complaint.

Paragraph 15 of the consolidated complaint alleges that by its overall conduct, including the conduct described above in paragraphs 8, 9(a) and (b), 10(a) through (c), 11(a) and (b), 12, 13, and 14(a) and (b), Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit. Since, as here pertinent, the complaint allegations in paragraphs 10(a) and (c) will be dismissed they should not be included here. Otherwise in view of the conclusions reached above, the Respondent violated Section 8(a)(5) and (1) of the Act as alleged in this paragraph.

Paragraph 16 of the consolidated complaint alleges that on or about May 7, 2001, Respondent, by Raul Burgos, at Respondent's facility, informed employees that they were receiving wage increases that the Union was not able to obtain for them as a reward for decertifying the Union. As noted above, during his cross-examination Vidal testified that Burgos told the employees

> that the employees had . . . petitioned not to be represented by the union any more, and as a result than the negotiations, and the wage increase would be done between the employees and the company.

Also as noted above, on redirect Vidal testified that while Burgos told the employees that a petition had been signed by a majority of the employees not to be represented by the Union and negotiations would be between the employees and the Company. Burgos never said either that the wage increases were being given as a reward for the petition or because the employees had signed a petition to get rid of the Union or because they had removed the Union, they were getting this increase. The best Burgos could manage in response to Vidal's testimony was that he did not recall telling the employees that there was a petition not to be represented by the Union, and as a result wage increases would be given by the Company. Burgos did testify that he never mentioned the petition to the employees during the 3 days of meetings he held with them regarding the wage increases. That part of his testimony is clearly con-

[83] Wilsher's belated exercise is not only irrelevant but it lacks credibility in that Wilsher relied on Grana, who is not a credible witness, for certain information, and Wilsher did not review all the documents herself.

[84] Notwithstanding the fact that Toledo may be included in the unit as the hourly supervisor in transportation, he is allowed to sign the adjustment log as a supervisor, and he has the title supervisor. He also was acting as an agent of the Respondent when he solicited Toro's signature, misleading him as to the purpose of the document.

[85] It is noted that Zdravecky did not show Damaris Fernandez on redirect what purports to be her signature on the disaffection petition. While the disaffection petition was not marked or introduced until later in the proceeding when Grana testified, one would think that if Damaris Fernandez clearly was mistaken, the page with what purports to be her signature could have been marked for identification on her redirect and she could have been given the opportunity to see what purports to be her signature on the disaffection petition. Was this a mistake on Zdravecky's part or did Zdravecky know or strongly suspect that the signature on the disaffection petition was a forgery and the Respondent's purpose would not be served by showing the signature to Fernandez? Again, the burden of proof is on the Respondent to prove the authenticity of the signatures.

trary to Vidal's testimony. Burgos is not a credible witness. Vidal impressed me as being basically a credible witness. The testimony of Vidal is credited.[86] While Burgos may not have specifically used the word "reward" and while he may not have specifically said, "[T]his is the wage increase that the Union was not able to obtain," the fact that he knew the employees were frustrated during negotiations because the Respondent would not make an economic proposal, the timing of his statements and the timing of the wage increase—when he said he would do something and not when, pursuant to negotiations, he should have done something—and the fact that he personally spoke to the employees about this matter (vis-a-vis circulating a notice about the wage increase without any mention of the Union, the petition or what was transpiring regarding the Union) referring to the petition and using the words "as a result" leads me to conclude that the General Counsel's interpretation of how the employees would objectively view what Burgos was saying is a reasonable and correct interpretation. The Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 16 of the consolidated complaint.

Paragraph 17(a) of the consolidated complaint alleges that Respondent, by Rene Largaespada, at Respondent's facility, in or around early May 2001, on a date not more specifically known by the General Counsel, informed employees that they were receiving wage increases as a reward for decertifying the Union. Since there is no evidence of record to support this allegation, it will be dismissed.

Paragraph 17(b) of the consolidated complaint alleges that Respondent, by Rene Largaespada, at Respondent's facility in or around early May 2001, on a date not more specifically known by the General Counsel, informed employees that it was replacing the Union with an "EAR" group to address employee grievances. Since there is no evidence of record to support this allegation, it will be dismissed.

Paragraph 18(a), in conjunction with paragraphs 18(c) and (d) of the consolidated complaint, alleges that in or around early May 2001, on a date not more specifically known by the General Counsel, Respondent created an "EAR" group as a replacement for the Union to deal directly with employees concerning terms and conditions of employment; that this relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purposes of collective bargaining; and that Respondent engaged in this conduct without giving the Union notice and an opportunity to bargain. Counsel for the General Counsel on brief contends that the Respondent sought to placate its bargaining unit employees by not only granting promised wage increases but also by forming an EAR committee created solely for the purpose of replacing the Union; that as Grana testified, employees could raise wage issues at the EAR committee if they so chose; that the issues addressed by the EAR committee qualify as conditions of work and concern the statutory collective-bargaining subjects such as wages and labor disputes; that since employees from each department are selected to serve on the committee, EAR meets the statutory definition of an employee representation committee under Section 2(5) of the Act, and, much like the Union, constitutes a labor organization, *Electromation, Inc*, 309 NLRB 990 (1992); and that the committee was established in order to replace the Union and deal directly with employees concerning terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. The Respondent on brief argues that there is no evidence that EAR had any authority to bargain on behalf of the employees or to resolve employee grievances regarding wages, hours, and working conditions; that the reimplementation of the EAR committee in May 2001 cannot constitute a failure to bargain in good faith with the Union given that the implementation of the EAR committee was not announced until some three weeks after the Company lawfully withdrew recognition from the Union; and that the "Company was certainly entitled to communicate directly with the employees, including to hear grievances, and resolve disputes in the absence of a union. See *Brown & Root*, 308 NLRB 1206 (1992) (finding that it is lawful to make unilateral changes after withdrawal of recognition)." (R. Br. 89.) As concluded above, however, the Respondent unlawfully withdrew recognition from the Union. Also, as concluded above, while the exact word "replace" may not have been used, this is exactly what the Respondent was doing. As alleged, Respondent created the "EAR" committee as a replacement for the Union to deal directly with employees concerning terms and conditions of employment in that the Respondent indicated its willingness to entertain grievances that relate to wages, hours and other terms and conditions of employment of the unit, which are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in this conduct without giving the Union notice and an opportunity to bargain. The Respondent violated Section 8(a)(5) and (1) of the Act as alleged in paragraphs 18(a), (c), and (d) of the consolidated complaint.

Paragraph 18(b), in conjunction with paragraphs 18(c) and (d), paragraph 21, and paragraph 23 of the consolidated complaint, alleges that in or around mid-to-late May 2001, on a date not more specifically known by the General Counsel, Respondent implemented retroactive wage increases for employees in the unit; that this relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject for the purposes of collective bargaining; that Respondent engaged in this conduct without giving the Union notice and an opportunity to bargain; that Respondent engaged in this conduct because the employees of Respondent joined, supported, and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities; and that Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization. Counsel for the General Counsel on brief contends that given the correlation between the decision to grant a retroactive wage increase with representations made by Respondent during negotiations, and representations made to employees that they were no longer represented by the Union, it is evident that the retroactive wage increase was intended to reward the unit employees for their actions in connection with the disaffection petition and

[86] As noted above, Burgos' testimony conflicts with the testimony of Vidal with respect to other matters. Burgos lied under oath about material matters in his attempt to, among other things, justify the payment of the May 2001 wage increases.

discourage membership in the Union in violation of Section 8(a)(3) of the Act; and that because the withdrawal of recognition here is clearly unlawful, the unilateral implementation of a retroactive wage increase on May 4, 2001, constitutes a violation of Section 8(a)(5) of the Act as well. The Respondent on brief argues that it did not violate Section 8(a)(5) and (1) of the Act by unilaterally implementing across-the-board wage increases effective May 4, 2001, and in granting the increase it did not discriminate against those who continued to support the Union in violation of Section 8(a)(3) of the Act. As concluded above, the wage increase was, in effect, described to the employees as a reward. It was intended to discourage support for the Union. And since it was unilaterally implemented after the Respondent unlawfully withdrew recognition of the Union, the Respondent violated Section 8(a)(5) and (1) of the Act, in addition to Section 8(a)(1) and (3) of the Act, as alleged in paragraphs 18(b), in conjunction with paragraphs 18(c) and (d), paragraph 21, and paragraph 23.

Paragraph 19 of the consolidated complaint alleges that on or about July 4, 2001, Respondent, by Nelson Nunez, at Respondent's facility, threatened employees with discharge due to their union membership, activities, and sympathies. The only witness testifying in support of this allegation is Hurtado. For the reasons set forth below, Hurtado is not a credible witness. His testimony will be credited only in those instances where it is corroborated by a reliable witness or a reliable document. Supposedly Nunez threatened to fire Hurtado because 4 days earlier Hurtado distributed union authorization cards to employees in the parking lot at the Respondent's facility. Hurtado did not testify that any supervisor saw him distributing the cards. He did testify that Demaris Fernandez was there when Nunez threatened to fire him. She did not corroborate him. In fact when the Respondent called her as a witness, she denied knowledge of any such incident. Nunez denied making the threat. Nunez' testimony is credited. This allegation of the consolidated complaint will be dismissed.

Paragraphs 20(a), (b), (c), and (d), in conjunction with paragraphs 21 and 23, of the consolidated complaint collectively allege that on or about July 10, 2001, Respondent verbally reprimanded Hurtado, on or about July 18, 2001, Respondent issued a first final warning to Hurtado, on or about July 18, 2001, Respondent suspended Luis Hurtado for 4 days, and on or about July 25, 2001, Respondent issued two final warnings to Hurtado all because Hurtado joined, supported and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities; and that Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization. The General Counsel on brief contends that Respondent has failed to satisfy its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); that Respondent has not shown that it has ever warned or disciplined an employee for any of the reasons asserted, much less suspended any employee for similar conduct; that Respondent began to strictly apply policies with respect to the use of the log book in a discriminatory fashion; that prior to having knowledge of Hurtado's efforts to acquire support for the Union, the record clearly reflects that Respondent did not monitor the use of the log books; that the Respondent considered Hurtado's union support when it disciplined him based on the timing of the disciplinary actions; and that, therefore, the Respondent violated Section 8(a)(3) of the Act. The Respondent on brief argues that Hurtado gave inconsistent and incredulous testimony with respect to changing the log sheets in Grana's office; that Grana could have terminated Hurtado for his admitted falsifying of his time entries in the logs but since she could not prove that he falsified the supervisor's initials and because other employees had also written themselves into the adjustment log, Grana gave Hurtado the benefit of the doubt and did not terminate him but rather suspended him; that under *Wright Line*, supra, a company may rebut a prima facie showing by demonstrating that it would have taken the same action even in the absence of the employee's union activity; that in *Carambola Beach Hotel*, 307 NLRB 915 (1992), the Board affirmed a judge's decision that the employer lawfully discharged an employee for "stretching time" on his timesheets, even though the employee had also engaged in protected activities; that in *Animal Humane Society*, 287 NLRB 26 (1986), the Board held that in cases of employee dishonesty, in the absence of persuasive evidence of pretext, a discharge is justified and not an unfair labor practice; that counsel for the General Counsel failed to establish that Hurtado was treated any differently than any other employee who has engaged in similar conduct; that while the Respondent issued only verbal warnings to Damaris Fernandez and Salinas for making their own entries in the adjustment log and for their excessive use of the adjustment log, these two employees had not resorted to deceit in an attempt to conceal their tardiness and neither had been counseled previously regarding their abuse of the adjustment log; that Hurtado not only admitted that he falsified his records in violation of company policy, but his testimony is rampant with inconsistencies and it is clear that while under oath, Hurtado had no problem changing his story several times, depending on who was asking the questions and when they were asked.; that Hurtado not only changed his testimony several times as to when he came in on July 12, 2001, and what he recorded his time in the log as, but he also changed his mind several times as to whether he had changed the logs when Grana showed them to him in the July 18, 2001 meeting; and that given Hurtado's admission of misconduct, counsel for the General Counsel is hard-pressed to argue that the discipline dispensed violated Section 8(a)(3) of the Act.

Pursuant to *Wright Line*, supra, the Board employs a causation test in all cases alleging a violation of Section 8(a)(3) or (1) of the Act turning on employer motivation. Counsel for the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was "motivating factor" in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To make a prima facie showing, Counsel for the General Counsel must show that Hurtado engaged in union activity, that the Respondent knew that he engaged in union activity, that such activity was a motivating factor in the Com-

pany's disciplinary action, and that there was antiunion animus on the part of the Respondent. The Respondent may rebut a prima facie showing by proving that it would have taken the same action even in the absence of the employee's union activity. If the Company meets this burden, counsel for the General Counsel must demonstrate that the employer's proffered justification is a pretext for discriminatory conduct.

Hurtado is not a credible witness. Eventually he admitted that the original entries he made in the adjustment log were incorrect and he knew at the time he made them that they were incorrect. Hurado also realized that against company policy he would have been paid for time he did not work. On rebuttal, Hurtado began testifying that although the card he used to clock-in worked during a period of time, he was required to summon a supervisor to clock in because previously he had engaged in union activity. When an attempt was made to determine when and why this happened, Hurtado testified that he could not give the period that it occurred but he speculated that it was due to his union activity. Also on rebuttal for the first time Hurtado testified that he changed the log sheets in Grana's office because she told him to do it. If Grana was trying to emphasize to Hurtado that employees should not be writing in the adjustment log, it is not clear why she would unnecessarily ask him to do just that. Hurtado changed his testimony on rebuttal regarding how long he was at the Respondent's facility before he went to the Airport on July 12, 2001. Originally, he testified that as he arrived at work Rosario sent him to the airport, and when he arrived at work he immediately got in a truck and went to the airport. But on rebuttal Hurtado changed his testimony in that he now testified that when he arrived at the Respondent's facility on July 12, 2001 he went into the facility and then he left for the airport at 4:30 p.m. The obvious question is if he went into the Respondent's facility before leaving for the airport, why didn't he clock in or have an entry made in the adjustment log at that time. Regarding the June 28, 2001 American West incident, Hurtado testified that he and Toledo made entries in the red book. Yet when he was shown the red book he could not find the entries. Contrary to Hurtado's assertion, I do not believe that the Labor Department was mentioned in his conversation with Grana regarding his discipline. With respect to his testimony that he solicited signatures on union authorization cards in the Respondent's parking lot on June 30, 2001, no other employee corroborated him. And Armero did not corroborate Hurtado with respect to Hurtado's testimony that he turned these signed cards over to Armero, And finally while according to Hurtado, Damaris Fernandez was present when Nunez allegedly threatened to fire him on July 4, 2001, she did not corroborate Hurtado when she testified. While an interpreter was used with Hurtado, that fact alone does not explain the changes in Hurtado's testimony, the contradictions, the almost total lack of corroboration notwithstanding the obvious shortcomings in Hurtado's testimony, and the failure to attempt to explain some of the glaring inconsistencies.

Counsel for the General Counsel has not demonstrated that Respondent was aware that Hurtado engaged in union activity before he was disciplined. Indeed, counsel for the General Counsel has not demonstrated that Hurtado engaged in union activity since she is relying solely on Hurtado's testimony and he is not a credible witness. Counsel for the General Counsel has demonstrated that Hurtado was disciplined and that there is antiunion animus on the part of the Respondent. But this is not sufficient to make a prima facie showing. Assuming, arguendo, that counsel did establish a prima facie case, the Respondent has demonstrated that it had a legitimate business justification for taking the action it did with respect to Hurtado. As coordinator, Hurtado had final responsibility on the June 28, 2001 flight in question. While testifying, he demonstrated that he can have an attitude at times. It was not demonstrated that his discipline for the June 28, 2001 incident was disparate when this factor is taken into consideration. Also it has not been demonstrated that Hurtado was treated disparately regarding his other disciplines for it has not been shown that any other employee engaged in knowingly making incorrect entries in the adjustment log. What Hurtado did was very serious. He was attempting, against company policy, to get paid for time that he did not work. The July 12, 2001 entries were questioned by management because a determination had to be made which entry was correct so Hurtado could be paid accordingly. The July 13, 2001 entry was questioned because management wanted to determine why the first flight going out of the kitchen that day, which was the flight Hurtado was supposed to be coordinating, left late for the airport and it was missing a number of items. It was not that the Respondent was looking for things to discipline Hurtado over. Rather, it was that Hurtado created situations that not only caught the attention of management but demanded that management address and resolve the issues. Respondent has shown that it would have taken the same action regarding Hurtado even in the absence of any union activity, which union activity was not even proven here with respect to Hurtado. And counsel for the General Counsel has not demonstrated that the employer's justification is a pretext for discriminatory conduct. The Respondent did not violate the Act as alleged in paragraphs 20(a), (b), (c), and (d) of the consolidated complaint. This portion of the consolidated complaint will be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to provisions of Section 8(a)(1) of the Act:

(a) By failing and refusing on or about January 30, 2001, to provide a wage proposal to the Union.

(b) Through antiunion videos shown at the Respondent's Miami facility in February, March, and April 2001, soliciting employees to decertify the Union.

(c) Threatening employees on or about February 14, 2001, with loss of business opportunities due to their support for the Union.

(d) Threatening in May 2001 to withhold wage increases due to employees' support for the Union.

(e) Informing employees in or around early May 2001 that they were receiving wage increases as a reward for decertifying the Union.

(f) Informing employees on or about May 7, 2001, that it was replacing the Union with an "EAR" group to address employee grievances.

(g) Soliciting employee support on or about April 13, 2001, and on or around mid-April 2001 of a petition to decertify the Union

(h) Informing employees in April 2001 of the unlawful withdrawal of recognition and saying to employees that the Union was no longer their representative.

(i) Coercively interrogating an employee on March 28, 2001, about his union membership, activities and sympathies.

(j) Informing employees on or about May 7, 2001, that they were receiving wage increases that the Union was not able to obtain for them as a reward for decertifying the Union.

4. By implementing retroactive wage increases for employees in the involved unit to discourage employees from joining, supporting, and assisting a union and engaging in concerted activities, Respondent committed unfair labor practices contrary to provisions of Section 8(a)(1) and (3) of the Act.

5. By engaging in the following conduct Respondent committed unfair labor practices contrary to provisions of Section 8(a)(1) and (5) of the Act:

(a) Withdrawing recognition on or about April 18, 2001, of the Union as the exclusive collective-bargaining representative of the unit.

(b) Failing and refusing since on or about April 18, 2001, to meet and bargain with the Union upon request.

(c) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit by its overall conduct, including the conduct described above in paragraphs 8, 9(a) and (b), 10(b), 11(a) and (b), 12, 13, and 14(a) and (b).

(d) Creating an "EAR" group in or around early May 2001 as a replacement for the Union to deal directly with employees concerning terms and conditions of employment, which are mandatory subjects for the purposes of collective bargaining, without giving the Union notice and an opportunity to bargain.

(e) Implementing in mid-to-late May 2001 retroactive wage increases, which relate to terms and conditions of employment and are a mandatory subject of bargaining, for employees in the unit without giving the Union notice and an opportunity to bargain.

6. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act in any other manner.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. I shall recommend that the Respondent be ordered to recognize and on request, bargain with the Union as the bargaining representative of the employees in the appropriate unit and put in writing and sign any agreement reached in terms and conditions of employment and to post appropriate notices.

It would contradict the purposes of the Act if the employees in the involved unit were penalized by an Order which might be interpreted as requiring the Respondent to withdraw the May 2001 wage increase. Accordingly, nothing in this Decision and Order requires the Respondent to withdraw the May 2001 wage increase. The wage increase shall remain in effect.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[87]

ORDER

The Respondent, Flying Foods Group, Inc. d/b/a Flying Foods, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide a wage proposal to the Union.

(b) Through antiunion videos, soliciting employees to decertify the Union.

(c) Threatening employees with loss of business opportunities due to their support for the Union.

(d) Threatening to withhold wage increases due to employees' support for the Union.

(e) Informing employees that they are receiving wage increases as a reward for decertifying the Union.

(f) Informing employees that it was replacing the Union with an "EAR" group to address employee grievances.

(g) Soliciting employee support of a petition to decertify the Union

(h) Informing employees of its unlawful withdrawal of recognition and saying to employees that the Union was no longer their collective-bargaining representative.

(i) Coercively interrogating an employee about his union membership, activities and sympathies.

(j) Informing employees that they were receiving wage increases that the Union was not able to obtain for them as a reward for decertifying the Union.

(k) Implementing retroactive wage increases for employees in the involved unit to discourage employees from joining, supporting, and assisting a union and engaging in concerted activities.

(l) Withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit.

(m) Failing and refusing to meet and bargain with the Union upon request.

(n) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit by its overall conduct.

(o) Creating and maintaining an "EAR" group as a replacement for the Union to deal directly with employees concerning terms and conditions of employment, which are mandatory

[87] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

subjects for the purposes of collective bargaining, without giving the Union notice and an opportunity to bargain.

(p) Implementing retroactive wage increases, which relate to terms and conditions of employment and are a mandatory subject of bargaining, for employees in the unit without giving the Union notice and an opportunity to bargain.

(q) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO as the exclusive bargaining representative of the employees in the following appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time transportation employees, drivers, helpers, dispatch clerks, kitchen employees, equipment flight set-up employees, storeroom employees, dishroom employees, production employees (hot, cold cutlery/packing, tray set-up, dessert and cooks), porters, flight coordinators, lead persons in cold food, dishroom, storeroom, and equipment flight set-up, the transportation hourly supervisor and the storeroom hourly supervisor employed by the Employer at its Miami, Florida location; excluding all office clerical employees, storeroom clerks, maintenance employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

(b) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Miami, Florida facility copies of the attached notice marked "Appendix."[88] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its town expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 31, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 24, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to provide a wage proposal to the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO.

WE WILL NOT through antiunion videos, solicit you to decertify the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO.

WE WILL NOT threaten you with loss of business opportunities due to your support for the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO.

WE WILL NOT threaten to withhold wage increases due to your support for the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO.

WE WILL NOT inform you that you are receiving wage increases as a reward for decertifying the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO.

WE WILL NOT inform you that we are replacing the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO with an "EAR" group to address your grievances.

WE WILL NOT solicit your support of a petition to decertify the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO.

WE WILL NOT inform you of our unlawful withdrawal of recognition of the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO and say to you that the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO Union is no longer your collective-bargaining representative.

[88] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT coercively interrogate you about your union membership, activities, and sympathies.

WE WILL NOT inform you that you are receiving a wage increases that the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO was not able to obtain for you as a reward for decertifying the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO.

WE WILL NOT implement retroactive wage increases for you to discourage you from joining, supporting, and assisting a union and engaging in concerted activities.

WE WILL NOT withdraw recognition of the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO as your exclusive collective-bargaining representative.

WE WILL NOT fail and refuse to meet and bargain with the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO upon request.

WE WILL NOT fail and refuse by our overall conduct to bargain in good faith with the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO as your exclusive collective-bargaining representative.

WE WILL NOT create and maintain an "EAR" group as a replacement for the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO to deal directly with you concerning terms and conditions of employment, which are mandatory subjects for the purposes of collective bargaining, without giving the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO notice and an opportunity to bargain.

WE WILL NOT implement retroactive wage increases, which relates to terms and conditions of employment and are a mandatory subject of bargaining, for you without giving the Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with Hotel Employees Restaurant Employees International Union Local 355, AFL–CIO as the exclusive bargaining representative of the employees in the following appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time transportation employees, drivers, helpers, dispatch clerks, kitchen employees, equipment flight set-up employees, storeroom employees, dishroom employees, production employees (hot, cold cutlery/packing, tray set-up, dessert and cooks), porters, flight coordinators, lead persons in cold food, dishroom, storeroom, and equipment flight set-up, the transportation hourly supervisor and the storeroom hourly supervisor employed by the Employer at its Miami, Florida location; excluding all office clerical employees, storeroom clerks, maintenance employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

FLYING FOODS GROUP, INC D/B/A FLYING FOODS